FILED
AUG 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

88-292
CASE NO. _____

SUPREME COURT OF THE UNITED STATES

TERM: OCTOBER, 1988

BARBARA CONNER,

RESPONDENT,

V.

RUDY G. REINHARD AND THE ESTATE OF RICHARD J. ZOLPER, DECEASED, THROUGH AND BY IRENE M. ZOLPER, THE PERSONAL REPRESENTATIVE OF THE ESTATE OF RICHARD J. ZOLPER,

PETITIONERS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WRIT OF CERTIORARI

MARK A. WARPINSKI AND
JAMES M. KALNY
ATTORNEYS FOR PETITIONERS

POST OFFICE ADDRESS:
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QUESTIONS FOR REVIEW

A. Did the Appeals Court properly apply the qualified immunity rule of Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), to a Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), fact situation?

1. Did the Appeals Court err in holding that Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), and its progeny were sufficiently particularized to put petitioner Reinhard on notice that his conduct was unlawful in May of 1982?

2. Did the Appeals Court err in viewing all evidence in a light most favorable to respondent, or should it have considered the

objective reasonableness of the petitioner's action in light of all evidence?

3. Did the Appeals Court err in failing to address petitioner Reinhard's contention that he fired the respondent for insubordination under an objective standard of reasonableness?

4. Did the Appeals Court err in finding that sufficient evidence existed to find a cause of action existed against petitioner Zolper?

B. Did the Appeals Court err in holding that privity for the purpose of res judicata depends on whether an official is sued in his personal capacity or official capacity?

LIST OF PARTIES

The parties to this proceeding include exclusively those listed in the caption of this case.

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TABLE OF AUTHORITIES

OFFICIAL AND UNOFFICIAL REPORTS OF OPINION

The ruling of the Eastern District Court of the State of Wisconsin in the matter of Conner v. City of Green Bay, Case No. 83-C-414, in a final judgment dated November 6, 1984. No decision was published.

The rulings of the Eastern District Court of the State of Wisconsin in the instant case (Conner v. Reinhard, et al., Case No. 85-C-719) were handed down on April 18, 1986 (res judicata) and March 26, 1987 (qualified immunity). No decisions were published.

The decision of the Seventh Circuit dated May 19, 1988, is found at Conner v. Reinhard, et al., Case No. 87-1940 (1988).

STATEMENT OF GROUNDS FOR JURISDICTION

Petitioners appeal from the judgment of the Honorable Seventh Circuit Court

of Appeals dated May 19, 1988.

No request for rehearing was made by petitioners. However, a motion to stay the mandate of the Court of Appeals was filed on June 9, 1988, and granted.

Jurisdiction in the Supreme Court is sought by writ of certiorari pursuant to Title 28 U.S.C. Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. First Amendment of the U. S. Constitution.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

B. Title 42, United States Code, Section 1983.

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or

other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

In February of 1982, respondent, Barbara Conner, was employed by the City of Green Bay as a Clerk-Steno II. During her probationary period (the first six months) her immediate supervisor was petitioner Rudy Reinhard.

In addition to her office duties, respondent also took minutes for the City's Board of Ethics. On May 12, 1982, at such a meeting, during suspension of rules respondent elected to comment on one of the issues before the Board of Ethics. She personally transcribed what was said:

"Conner: I work for Rudy and I know that the Contingency Fund is not for this purpose.

Camilli: Your name, please, for the record.

Conner: Barbara Conner, 215 North Van Buren. I'm a citizen of Green Bay.

Camilli: You're also a city employee?

Conner: I'm a city employee and I have some concern about how we spend tax money.

Camilli: And you're aware of the Contingency Fund because of your work in the Comptroller's Office, is that correct?

Conner: Right. And I take the minutes of the Finance Committee meeting and I know the reticence with which they dip into the Contingency Fund."

Petitioner Zolper, an alderman for the City of Green Bay, was at that meeting of the Board of Ethics and appeared to be angry with respondent.

On May 13, 1982, petitioner Zolper met with petitioner Reinhard in Reinhard's office. There were no witnesses to the conversation, but the respondent assumes that the petitioners were talking about her.

On May 19, 1982, petitioner Reinhard gave respondent Conner the following letter:

> "In reference to the remark concerning the use of the Contingency Fund attributed to you at the May 12th, 1982, Board of Ethics Meeting, I must advise you that it was a case of poor judgment on your part when you expressed the views of the Comptroller's Office while acting as Recording Secretary for that Committee. If you had been attending the hearing not as the Recording Secretary but as a private citizen your personal viewpoint would have been more appropriate.
>
> In the future I would caution you, while acting as the Recording Secretary, not to speak for the Comptroller's Office unless questioned directly.
>
> I am sorry this situation arose and hope to avoid a similar situation in the future."

Petitioner Reinhard met with respondent, and in response to respondent's question concerning what the letter meant, he stated that she should not speak on his behalf without prior authorization. Respondent's undisputed response was that she would do the same thing again. Respondent then asked petitioner Reinhard if she should look for another job. Petitioner Reinhard did not discourage her. Shortly thereafter, without having received any notice of termination from any official of the City, respondent Conner held a press conference and stated that she had been fired.

In addition, she wrote a long letter dated May 20, 1982, to petitioner Reinhard. She delivered this letter to the Mayor although it was addressed to petitioner Reinhard. In it she expressed her dismay at petitioner

Reinhard having "no consideration for my right as an individual to express an opinion..." She stated that if Reinhard checked the recording of her remarks it would be clear that she was speaking as a citizen of Green Bay.

After hearing of Conner's "discharge" through the media and eventually receiving a copy of Conner's letter to him from the Mayor, petitioner Reinhard reviewed respondent Conner's past work history, his conversations with her, and her correspondence. Based on that consideration, he believed that respondent Conner was either being insubordinate or was simply refusing to listen to what he felt was a reasonable instruction and determined that plaintiff was not an employee he wished to have working in his department. Consequently, he discharged the respondent by letter dated May 24, 1982.

On March 17, 1983, respondent commenced Case No. 83-C-414 in the Eastern District Court of Wisconsin naming the City of Green Bay as the sole defendant (Appendix p. 76). After respondent concluded the presentation of her case, the City moved for summary judgment on the basis of respondent's failure to show that any injury to respondent was occasioned by the operation of an established policy, practice, or procedure of the City. The City's motion was granted on November 6, 1984, and the case dismissed.

On May 10, 1985, respondent commenced Case No. 85-C-719 naming Rudy Reinhard and Richard Zolper as defendants (hereinafter the "instant case"). Jurisdiction is alleged through 28 U.S.C. §1331 and 42 U.S.C. §1981 et seq. (Appendix p. 53). The second action alleged in virtually identical wording

the same injury to the same respondent by the same actors.

On December 4, 1985, petitioners moved for summary judgment on the basis of res judicata. This motion was denied by the court's decision of April 18, 1986 (Appendix p. 43).

On January 22, 1987, petitioners moved for summary judgment on the basis of qualified immunity. The District Court granted that motion in a decision dated March 26, 1987 (Appendix p. 30). After a motion to reconsider was denied, respondent appealed the March 26, 1987, decision and subsequent judgment of dismissal pursuant to 28 U.S.C. §1291 on June 10, 1987, to the Seventh Circuit Court of Appeals.

Petitioners raised the res judicata issue in the appeal, but in a May 19, 1988, decision, the Seventh Circuit reversed the decision of the District

Court and remanded this matter for trial. It is from that decision that petitioners seek this writ.

ARGUMENT FOR ALLOWANCE

A. The definition and applicability of the term privity in the context of claim preclusion merits review by this court.

In the case below, the Seventh Circuit made two holdings in regard to privity for the purposes of res judicata:

> 1. Where both cases have been brought in federal courts, res judicata must be decided in terms of federal law. Conner v. Reinhard, et al., Case No. 87-1940 (7th Cir. 1988) pp. 18-19
>
> 2. A government and its officers are generally not in privity for purposes of res judicata. (emphasis ours) Conner, supra, p. 20

Petitioners do not argue that federal law should be the source of the rule determining the res judicata issue in the present case. However, what constitutes the federal law in regard to

privity in the context of res judicata is difficult to determine. This court last addressed this issue in the case of Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 402, 60 S.Ct. 907, 84 L.Ed. 1263, 1276 (1939), in which the court held:

> "The result is clear. Where the issues in separate suits are the same, the fact that the parties are not precisely identical is not necessarily fatal. (citations omitted) Identity of parties is not a mere matter of form but of substance. Parties normally the same may be, in legal effect, different...and parties nominally different may be, in legal effect, the same. A judgment is res judicata in a second action upon the same claim between the same parties or those in privity with them. (citations omitted) There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the government."

The Sunshine, supra, rule is often cited in conjunction with the following quote of Cromwell v. County of Sac, 94

U.S. 351, 24 L.Ed. 195, 197 (1877), which stated:

> "The doctrine of res judicata is that a final judgment on the merits in a court of competent jurisdiction bars the same parties or their privies from relitigating not only the issues which were in fact raised and decided but also all other issues which could have been raised in the prior action."

Reading these precedents together, they imply that if the factual basis of the cases (the claims) are essentially the same in both suits, the parties need not be identical. That is if the same actors performed the same alleged wrong in both suits, the heading of the suit and legal strategy in selecting the defendant does not defeat the application of res judicata.

Following Sunshine, supra, almost verbatim, the Seventh Circuit held in the case of Mandarino v. Pollard, 718 F.2d 845, 850 (7th Cir. 1983):

"A government and its officers are in privity for purposes of res judicata."

This reading of Sunshine, supra, has been the rule in the Seventh Circuit in Lee v. Peoria, 685 F.2d 196 (7th Cir. 1982); Warren v. McCall, 709 F.2d 1183 (7th Cir. 1983); the Sixth Circuit in Ohio v. Menard, 766 F.2d 236 (6th Cir. 1985); the Ninth Circuit in Arevalo v. Woods, 811 F.2d 487 (9th Cir. 1987); and the Fourth Circuit in Thurston v. U.S., 810 F.2d 438 (4th Cir. 1987).

Some decisions, however, have begun to depart from or at least distinguish the Sunshine, supra, rule. The Eighth Circuit in the case of Headley v. Bacon, 828 F.2d 1272 (8th Cir. 1987), distinguished Sunshine, supra, as being based on collateral estoppel law as opposed to claim preclusion law. From there, the Headley, supra, court determined that in cases where a

governmental official is sued in a personal capacity, the court must consider on a case-by-case basis if the relationship between the parties is sufficiently close to render them in privity or (in Sunshine, supra, terms) to determine if the parties are the same in "legal effect". See also Micklus v. Greer, 705 F.2d 314 (8th Cir. 1983).

A third view of the privity issue is voiced in the First Circuit in the case of Roy v. City of Augusta, 712 F.2d 1517 (1st Cir. 1983), in which the court, basing its decision on the law of the State of Maine, specifically held that under well established rules of res judicata, an action brought against an individual in one capacity does not bar a later action brought against the same individual in a different capacity.

Consequently, there is no concise federal common law dealing with the

definition of the term "privity". For the sake of consistency alone, it is imperative that the Supreme Court clarify the application of res judicata in civil rights actions.

Recently this Court has further clarified the distinction between official and personal capacity suits and the elements of a suit against a public entity [St. Louis v. Praprotnik, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988)]. With these issues focused, the time is ripe to determine if a plaintiff must bring an action simultaneously against public employees and officials or if separate suits will be permitted. Because of the duty to defend statutes (see, for example, §895.42, Wis Stats.), clarification of the res judicata issue is essential to determine feasible insurance coverage for "future" suits

and actual costs and liabilities for pending actions.

The confusion created by the inconsistent application of the Sunshine, supra, rule in several Circuits must be resolved. A decision in the instant case by this Court will clarify the federal common law regarding the application of the Sunshine, supra, rule and define with some finality how res judicata will operate in federal civil rights lawsuits brought separately against a government and its officials.

B. This court must review and clarify the precise manner of applying the qualified immunity defense.

In the case of Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), at p. 2738, this court established the rule of qualified immunity:

> "We therefore hold that government officials performing discretionary functions generally are shielded from liability for

civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known...(citations omitted)"

Harlow, supra, suggests the standard of proof to be used in applying the qualified immunity defense is unique:

"It is not difficult for an ingenious plantiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decision-maker's mental process are involved. A sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually, under normal summary judgment standards, be sufficient [to force a trial]..." (p. 2738, S.Ct.)

In the subsequent case of Mitchell v. Forsyth, 472 U.S. 511, 86 L.Ed.2d 411, 105 S.Ct. 2806 (1985), at p. 425 L.Ed., this court held:

"The entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial."

It is, therefore, clear that the qualified immunity defense must be decided on a motion for summary judgment. What is not clear is precisely the legal burdens and evidentiary rules used in determining the qualified immunity defense.

The Circuits differ on what evidence should even be considered in determining the qualified immunity issue. The First Circuit Rule restricts the facts to those alleged in the pleadings [see Bonitz v. Fair, 804 F.2d 164 (1st Cir. 1986); Austin Mutual Securities, Inc. v. National Association of Securities Dealers, Inc., 757 F.2d 676 (5th Cir. 1985)]. Another view permits the motion after limited discovery based solely on evidence relevant to the qualified immunity defense [see Martin v. D.C. Metropolitan Police Department, 812 F.2d 1425 (D.C. Cir., 1987)]. Still other

Circuits are unclear but seem to require the motion to be brought anytime before trial based on varying evidentiary standards [Benson v. Allphin, 786 F.2d 276 n.19 (7th Cir.), cert. denied, 107 S.Ct. 172 (1986); Creamer v. Porter, 754 F.2d 1311 (5th Cir. 1985)]. Finally, this court, in Anderson v. Creighton, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), supported the position permitting discovery; although this opinion seems limited to Fourth Amendment cases.

The Circuits also differ on what standard of proof is to be applied to the qualified immunity elements. Many Circuits hold that facts must be viewed in the light most favorable to the defendant to determine both if the right was clearly established and if the public official should have known the act violated that right [see Gutierrez v. Municipal Court of the Southeast

District, County of Los Angeles, 838 F.2d 1031 (9th Cir. 1988); Miller v. Solem, 728 F.2d 1020 (8th Cir. 1983); Green v. Carlson, 826 F.2d 647 (7th Cir. 1987)]. Other Circuits read Harlow, supra, much more restrictively and hold the qualified immunity defense must be reviewed under standards different from those of ordinary summary judgment. In Martin, supra, the Court held:

> "We recognize that in an ordinary case, where 'the inferences to be drawn from the underlying facts...must be drawn in the light most favorable' to the opponent of the summary judgment motion...
>
> * * *
>
> This is not, however, an ordinary case...The Supreme Court's 'strong condemnation of insubstantial suits against government officials,' Krohn v. United States, 742 F.2d 24, 31 (1st Cir. 1934), impels the application of a standard more demanding of plaintiffs when public officer defendants move for summary judgment on the basis of their qualified immunity." (p. 1435)

Consequently, this Court should consider and conclusively decide under what specific standard of proof is a qualified immunity issue to be considered.

Finally, the interplay of a state-of-mind element further confuses the issue. Where state of mind is an element of the plaintiff's case, some courts have required the plaintiff to show evidence of such state of mind as part of their "proof" in a qualified immunity case or at least require the court to determine if the defendant "should have known" of the existence of the right violated [see Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984); Creamer, supra, Martin, supra; and Miller, supra]. On the other hand, some courts have held that proof relating to state of mind should not be considered (see Gutierrez, supra).

The instant case is one which requires the application of the rule of Mt. Healthy, supra. The Mt. Healthy, supra, rule requires plaintiff to show that the conduct was protected and that the conduct was a substantial motivating factor in the decision to discharge. Consequently, a Mt. Healthy, supra, case includes a state-of-mind consideration as part of plaintiff's case.

Inasmuch as the Supreme Court has never heard a qualified immunity case involving the Mt. Healthy, supra, rule, it is not clear how qualified immunity is to be applied in this context. The issue which should be addressed is what course of action should a court follow where the defendant in a Mt. Healthy, supra, case states facts suggesting he or she had a reasonable basis for not realizing his or her conduct violated a clearly established right and showing

that the discharge was not motivated by impermissible reasons. The rationale of Hobson, supra, Martin, supra, and Miller, supra, suggests the court can consider the reasonableness of the defenses and require something more than circumstantial or inferential support for plaintiff to defeat qualified immunity. This rationale supplies more protection to public officials and would probably result in less of these cases going to trial. If the rationale of Gutierrez, supra, is utilizied, the public official's motive would always be a question of fact, and qualified immunity could be defeated in a Mt. Healthy, supra, case simply by alleging that the discharge took place for unconstitutional reasons. [In an analogous view, see also Floyd v. Farrell, 765 F.2d 1 (1st Cir. 1985).] In either case, the law concerning the

application of qualified immunity in a Mt. Healthy, supra, case must be clarified.

This Court has repeatedly acknowledged the importance of qualified immunity as it affects the willingness of people to serve their government in a vigorous and deliberate manner [see Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978); Pierson v. Ray, 386 U.S. 547, 554, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967)]. Based on protecting those interests, this court has recently created a new elevated standard of qualified immunity in the case of federal officers and Fourth Amendment cases (see Anderson v. Creighton, supra,). In contrast, the divergence of opinion in the Circuits is complicating the application of immunity and defeating the purpose of those protections. If qualified immunity is

to save the public-sector defendants from time-consuming litigation and high legal costs of meritless claims, the defense must be both readily understood and applied to circumstances confronting the employee.

Qualified immunity was based on the sound principle that public officials should be protected by a basic shield of reasonableness. The concept that those who represent us should be allowed to act in a manner which is reasonable, certainly is a desirable goal promoting both efficient, effective government and protecting civil rights.

This case presents in a concise and orderly manner issues which need to be resolved in clarifying the application of qualified immunity. By granting the writ, this court can address these issues and reestablish a consistent application of qualified immunity.

Dated at Green Bay, Wisconsin, this 15th day of August, 1988.

Respectfully submitted,

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APPENDIX

MARK A. WARPINSKI AND
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In the
United States Court of Appeals
For the Seventh Circuit

No. 87-1940

BARBARA CONNER,

Plaintiff-Appellant,

v.

RUDY G. REINHARD, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 85 C 719—**Terence T. Evans**, *Judge.*

ARGUED DECEMBER 1, 1987—DECIDED MAY 19, 1988

Before WOOD, JR. and CUDAHY, *Circuit Judges*, and WILL, *Senior District Judge.**

WOOD, JR., *Circuit Judge.* In an action brought under 42 U.S.C. § 1983, plaintiff Barbara Conner charged that she was fired from her job with the City of Green Bay in violation of her first amendment right to freedom of speech. Conner named as defendants Rudy Reinhard, her

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* The Honorable Hubert L. Will, Senior District Judge for the Northern District of Illinois, is sitting by designation.

former supervisor, and the estate of Richard Zolper,[1] a former alderman for the City of Green Bay. The district court granted the defendants' motion for summary judgment based upon their affirmative defense of qualified immunity.

I. FACTUAL BACKGROUND

Plaintiff Barbara Conner was hired as a Clerk Steno II for the Comptroller's Office of the City of Green Bay in February 1982. Defendant Rudy Reinhard, Comptroller for the City of Green Bay, was Conner's immediate supervisor.

In addition to her regular duties, Conner also took minutes at the Board of Ethics meetings. The Board of Ethics handled complaints that alleged violations of the city's Ethics Code. Defendant Richard Zolper was a member of the Board of Ethics in May 1982. On May 12, 1982, Conner was taking the minutes of a Board of Ethics meeting when a discussion arose concerning the use of money from the city contingency fund to investigate alleged wrongdoing by alderman Guy Zima. During the course of the meeting, the Board suspended the rules to allow interested parties to speak. The following exchange between the Board members and Barbara Conner took place:

Camilli: Is there anybody else that would like to speak?

Conner: I'd like to speak a little bit about the Contingency Fund not being for this purpose.

Marinan: What are you linked to?

Conner: I'm a citizen of Green Bay.

Marinan: You have no right to speak now.

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[1] Richard Zolper died in 1984. Conner therefore named his estate, through Irene Zolper, the personal representative of the estate, as a defendant in this suit. For our own convenience, we will refer to this defendant as "defendant Zolper."

Venci: Why? We suspended the (regular) order to let everybody speak.

Zolper: Well, if you're going to speak then we want your name and address and your position . . . what you do for a living.

Marinan: And we want to cross examine you . . . tell how you know that fact.

Venci: That's really intimidation, you guys.

Zolper: It's not.

Conner: I work for Rudy and I know that the Contingency Fund is not for this purpose.

Camilli: Your name, please, for the record.

Conner: Barbara Conner, 215 North Van Buren. I'm a citizen of Green Bay.

Camilli: You're also a city employee?

Conner: I'm a city employee and I have some concern about how we spend tax money.

Camilli: And you're aware of the Contingency Fund because of your work in the Comptroller's Office, is that correct?

Conner: Right. And I take the minutes of the Finance Committee meeting and I know the reticence with which they dip into the Contingency Fund.

Appendix of Plaintiff-Appellant at 165.

As the district court found, Zolper appeared to be angry with Conner at the meeting. A few days after the May 12th meeting, Zolper visited Reinhard in his office and, according to Conner, slammed the door shut.

On May 19, 1982, Conner received the following letter of reprimand from Reinhard:

> In reference to the remark concerning the use of the Contingency Fund attributed to you at the May 12th, 1982, Board of Ethics Meeting, I must advise

> you that it was a case of poor judgment on your part when you expressed the views of the Comptroller's Office while acting as Recording Secretary for the Committee. If you had been attending the Hearing not as the Recording Secretary but as a private citizen your personal viewpoint would have been more appropriate.
>
> In the future I would caution you, while acting as the Recording Secretary, not to speak for the Comptroller's Office unless questioned directly.
>
> I am sorry this situation arose and hope to avoid a similar situation in the future.

Record Item 26 at 3.

Upon receiving this letter, Conner asked Reinhard what the letter meant. Reinhard advised Conner not to speak on his behalf without prior authorization. Conner replied that if the situation occurred again, she would do the same thing. Shortly thereafter, Conner announced to the press that she had been fired.

Conner also wrote a long letter to Reinhard, dated May 20, 1982. In that letter, she expressed her disappointment at Reinhard's refusal to consider her right as an individual to express an opinion. Conner also opined that if Reinhard checked the transcript of the May 12th meeting, he would find that she had been expressing her personal viewpoint, and not that of the Comptroller's Office:

> I do not know the view of the Comptroller's Office. I did check with Lou Marchetti, chairman of the Finance Committee, about the use of the Contingency Fund, and as I had surmised from being present at Finance Committee Meetings, the Contingency Fund is for unforeseen emergencies and Acts of God, such as severe winters, floods, equipment breakdowns, etc. It is not for flying to Louisiana oil rigs to check on past activities of Councilman Guy Zima. It is not for personal vendettas.

Record Item 26 at 4. Reinhard terminated Conner's employment on May 24, 1982.

Conner initially filed an action regarding the events of May 1982 on March 11, 1983 in the Eastern District of Wisconsin, naming the City of Green Bay as defendant. Three months prior to the trial, Conner attempted to join Reinhard as a defendant, but the court denied that motion as untimely. The trial commenced with the city as the sole defendant. During the second day of trial, the district court granted the city's motion for a directed verdict because Conner failed to show a custom or policy that could result in municipal liability. Conner subsequently filed the present lawsuit on May 10, 1985, naming Rudy Reinhard and the estate of Richard Zolper as defendants.

On December 6, 1985, the defendants filed a motion for summary judgment based on the doctrine of claim preclusion.[2] The district court denied that motion on April 18, 1986.

At the completion of discovery, the defendants again moved for summary judgment, this time on the basis of qualified immunity. On March 26, 1987, the district court granted the defendants' motion. We have jurisdiction over this appeal under 28 U.S.C. § 1291.

II. ANALYSIS

Conner appeals the district court's ruling that the defendants are qualifiedly immune from suit. Conner also argues that because there are material factual issues in dispute, the district court erred in granting summary judgment. The defendants, of course, contend that the district court properly ruled on their motion for summary judgment. In addition, the defendants argue that even if this court finds that they are not entitled to qualified immunity, the doctrine of claim preclusion bars this suit. Finally, defendant Zolper claims that the plaintiff has no basis on which to hold him liable for her wrongful discharge.

[2] The traditional term for claim preclusion is res judicata.

A. Qualified Immunity

1. General Principles

The doctrine of qualified immunity shields government officials performing discretionary functions from liability for civil damages. The doctrine is designed to accommodate competing values. An action for damages may provide a citizen with her only means of vindication when an official violates her constitutional rights. Courts, however, must also protect against the danger that the fear of being sued will hamper officials in the proper discharge of their duties. Qualified immunity allows courts to quickly terminate insubstantial lawsuits, without denying worthy claimants their day in court. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). Officials cannot receive qualified immunity, however, if their conduct violated clearly established constitutional rights of which a reasonable person would have known. *Id.* at 818.

Summary judgment is proper only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Donald v. Polk County*, 836 F.2d 376, 378-79 (7th Cir. 1988). As this court has explained, "appellate review of a denial of summary judgment on the issue of qualified immunity is limited to the legal question of whether the law was well established at the time of the conduct." *Wade v. Hegner*, 804 F.2d 67, 70 (7th Cir. 1986); *see Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985). "[I]f there are issues of disputed fact upon which the question of immunity turns, or if it is clear that the defendant's conduct did violate clearly established norms, the case must proceed to trial." *Green v. Carlson*, 826 F.2d 647, 652 (7th Cir. 1987).

Conner has the burden of demonstrating that the defendants violated a constitutional right that was clearly established in May 1982. *Davis v. Scherer*, 468 U.S. 183, 197 (1984); *Abel v. Miller*, 824 F.2d 1522, 1534 (7th Cir. 1987). The Supreme Court recently provided courts with guidance in determining whether the law was clearly established at the time of an alleged constitutional violation:

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> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of preexisting law the unlawfulness must be apparent.

Anderson v. Creighton, 107 S. Ct. 3034, 3039 (1987) (citation omitted).

As this circuit has held: " 'The right must be sufficiently particularized to put potential defendants on notice that their conduct probably is unlawful.' . . . Our conclusion is that the test for immunity should be whether the law was clear in relation to the specific facts confronting the public official when he acted." *Colaizzi v. Walker*, 812 F.2d 304, 308 (7th Cir. 1987) (quoting *Azeez v. Fairman*, 795 F.2d 1296, 1301 (7th Cir. 1986)). We have repeatedly recognized the inherent difficulties in either characterizing the right too generally, *see, e.g., Azeez*, 795 F.2d at 1301, or describing the fact situation with such detail that each case becomes unique, *see, e.g., Wade v. Hegner*, 804 F.2d at 71. To overcome these problems, we have " 'required caselaw which clearly and consistently recognized the constitutional right.' " *Lojuk v. Johnson*, 770 F.2d 619, 628 (7th Cir. 1985) (quoting *Coleman v. Frantz*, 754 F.2d 719, 730 n.15 (7th Cir. 1985)), *cert. denied*, 474 U.S. 1067 (1986). Although we do not require cases involving the exact fact pattern at bar, case law in a closely analogous area is essential to permit us to conclude that the constitutional right was clearly established at the time of the alleged violation. *Lojuk*, 770 F.2d at 628; *Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir. 1986) ("whenever a balancing of interests is required, the facts of the existing caselaw must closely correspond to the contested action before the defendant official is subject to liability under . . . *Harlow*"), *cert. denied*, 107 S. Ct. 172 (1987) (the Court denied two petitions for certiorari, Nos. 86-27 & 86-29). Of course, we must limit our analysis to cases decided prior to May 1982, when the alleged violation occurred. *Zook v. Brown*, 748 F.2d 1161, 1164 (7th Cir. 1984).

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2. Pickering *Balancing Test*

Since 1968, it has been established that government officials cannot prohibit public employees from exercising their right to engage in speech protected by the first amendment. In *Pickering v. Board of Education*, 391 U.S. 563 (1968), a high school teacher was dismissed after his letter criticizing the school board's budgetary policies was published in a local newspaper. The Supreme Court found that the letter discussed a legitimate topic of public interest and therefore was entitled to first amendment protection. Nevertheless, the Court held that the teacher's interest in freely expressing his views on matters of public concern must be balanced against his employer's interest in effective and efficient public service. *Id.* at 568. The Court found that the statements were not directed to anyone with whom the teacher had daily contact and therefore did not undermine discipline or harmony among co-workers. In addition, the teacher's employment relationships with the school board and superintendent were not ones calling for loyalty and confidence. Finally, the Court found that the teacher's statements did not interfere with the teacher's daily duties or the general operation of the school. The Court therefore concluded that the employer's interests did not outweigh the teacher's first amendment rights. *Id.* at 569-73.

Subsequent Supreme Court cases reaffirmed the right of public employees to speak out on matters of public concern. *Branti v. Finkel*, 445 U.S. 507 (1980); *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979); *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976); *Perry v. Sindermann*, 408 U.S. 593 (1972).

The defendants concede that Conner's statements at the May 12th meeting involved a topic of public concern.[3] Un-

[3] Although the defendants do not dispute that the proper use of the contingency fund was a matter of public interest, the defen-

(Footnote continued on following page)

der *Pickering* and its progeny, then, the defendants could justifiably retaliate against Conner for her speech only if her statements were so disruptive that they substantially impeded the performance of her duties or interfered with the functioning of the office.

Therefore, we need to consider whether, under the clearly established law in May 1982, the statements were so disruptive that the defendants were justified in retaliating against Conner. In *Clark v. Holmes*, this court outlined factors to consider in the balancing process, including: (1) the effect of the plaintiff's conduct on discipline and harmony among co-workers; (2) the need for confidentiality; (3) whether the conduct impeded the employee in competently performing her daily duties; and (4) the need to encourage a close and personal relationship involving loyalty and confidence between the employee and her superiors. 474 F.2d 928, 931 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973). Because the balancing of factors is involved, we must consider whether any closely analogous case law prior to 1982 indicated that Conner had a clearly established right to speak at the Board of Ethics meeting with-

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[3] *continued*

dants claim that Conner's speech was not clearly protected because she appeared to be speaking on behalf of her employer. In ruling on the issue of qualified immunity, we must view the undisputed evidence in the light most favorable to Conner. *Green v. Carlson*, 826 F.2d at 650 ("when considering the qualified immunity issue on a motion for summary judgment, a district court should consider all of the undisputed evidence in the record, read in the light most favorable to the non-movant"). The primary undisputed evidence in this case consists of the actual words that Conner spoke at the Board of Ethics meeting. Those words could arguably be interpreted as either the viewpoint of a private citizen who also happened to be employed by the city, or as the official view of the Comptroller's Office as related by an employee of that office. We are bound, however, to draw all reasonable inferences in the light most favorable to Conner; therefore, we will assume that Conner was expressing her viewpoint as a private citizen, even though at the time she was performing her duties as an employee of the city.

out fear of retaliation by her employer. *See Benson v. Allphin*, 786 F.2d at 276.

a. Discipline and Harmony

The defendants assert that Conner's statements were acts of insubordination and therefore must necessarily have affected the discipline and harmony among Conner's co-workers. In *Hanneman v. Breier*, 528 F.2d 750 (7th Cir. 1976), Milwaukee policemen brought a class action against the chief of police and the City of Milwaukee. The named plaintiffs were members of the Milwaukee Professional Policemen's Protective Association (MPPPA). A front-page story in a Milwaukee newspaper on September 16, 1970 had disclosed that the police department was conducting an internal investigation concerning the MPPPA. The following day, September 17, the MPPPA had distributed a letter to city and state officials. This letter had confirmed the factual details contained in the newspaper account. In addition, the letter had charged Police Chief Breier with conducting the investigation for improper purposes. The MPPPA officers were subsequently disciplined for violating a department rule prohibiting the disclosure of confidential police business. The plaintiffs claimed that the discipline imposed on them violated their first amendment rights. In applying the *Pickering* balancing test, we recognized that departmental discipline may be undermined when police officers disobey an official regulation and an express order not to disclose police business. Nevertheless, the MPPPA members did little damage by disclosing the information since the newspaper article had already revealed to the public that an investigation was underway. We weighed the department's interest in discipline against the police officers' first amendment interest in publicizing potential abuse by their police chief. In addition, we noted that the government officials and the public at large also had a first amendment interest in being informed of potential misuse of the department's investigatory power. We concluded that the department had not shown a compelling interest sufficient to outweigh the first amendment interests of the government officials and the public. *Id.* at 754-56.

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Conner, like the policemen in *Hanneman*, has a compelling first amendment interest in pointing out to government officials what she perceived as misappropriation of public funds. In addition, both the public and government officials have a first amendment interest in being informed of the potential misuse of public funds. We acknowledge that an insubordinate act by one worker potentially could have an undesirable effect on office harmony and discipline. Nevertheless, the defendants have not provided us with any evidence of actual harmful effects resulting from Conner's alleged insubordination. Thus, the potential for office disciplinary problems in this case is not sufficiently "persuasive" for us to conclude that this factor outweighs Conner's interest in free speech. *See Hanneman*, 528 F.2d at 753 (only where *Clark* factors "are present and persuasive may an individual's otherwise protected freedom of speech be subordinated to the state interest").

b. Confidentiality

The defendants do not suggest that Conner's statement at the Board of Ethics meeting dealt with confidential information, nor is there any evidence that such was the case. As in *Pickering*, 391 U.S. at 572, and *Hanneman*, 528 F.2d at 755, the defendants have not shown that Conner was privy to information that was not accessible to the ordinary citizen or that her position made it difficult for the defendants to rebut her statements. *See also Donahue v. Staunton*, 471 F.2d 475, 481 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973).

c. Performance of Daily Duties

The defendants claim that Conner's conduct at the May 12th meeting disrupted her from performing her regular duties. To support this claim, the defendants assert that Conner spent "considerable time" typing the transcript of the Board of Ethics meeting, although she was not requested to do so. In addition, Conner took time out from

her work to discuss the Board of Ethics meeting with the mayor.[4]

In *Donahue v. Staunton*, 471 F.2d 475 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973), a chaplain was fired from his position with a state mental hospital after publicly criticizing conditions at the hospital. This court held that the defendants violated the chaplain's first amendment right to speak on matters of public concern. The chaplain's regular duties included helping outside groups to understand the problems concerning patients, and interpreting the institution's problems and policies for the public. We found that "this was [not] such a critical responsibility of a Chaplain as to give the State a strong enough interest to interfere with the plaintiff's free speech rights." *Id.* at 481.[5] We concluded that the chaplain's individual interest in free speech, together with society's interest in uninhibited and robust debate on matters of public concern, outweighed the state's interest as an employer. *Id.*

The public has a legitimate interest in receiving information concerning abuse within public institutions, whether it be deplorable conditions in state mental hospitals or inappropriate use of taxpayers' funds. An employer certainly has a right to expect his employees to attend to their duties during working hours. Nevertheless, where the interference with the plaintiff's regular duties is de minimis or merely speculative, the employer's interest is not sufficiently persuasive to outweigh important first amendment rights. *See Hostrop v. Board of Junior College Dist. No. 515*, 471 F.2d 488, 492-93 & nn.12, 14 (7th Cir. 1972) (defendant must show evidence of the *actual* effects of plaintiff's speech before court will find that the

[4] We note that the defendants do not claim that Conner's conduct distracted her from adequately performing her duties as recording secretary at the May 12th meeting.

[5] We also found of some importance the fact that when the chaplain was evaluated on those particular duties, he received a rating of "good." *Donahue*, 471 F.2d at 481.

employer was justified in discharging plaintiff), *cert. denied*, 411 U.S. 967 (1973). The defendants in this case do not indicate whether the time spent on the unauthorized activities prevented Conner from completing her regular duties. In addition, the defendants do not suggest nor does the record reveal the amount of time Conner spent on the allegedly unauthorized activities. This is not the kind of sufficiently persuasive evidence necessary to outweigh the plaintiff's right to freedom of speech.

d. Loyalty and Confidence

Finally, the defendants argue that Conner's conduct discouraged a close and personal relationship between her and Reinhard in a situation calling for loyalty and confidence. Reinhard, as Conner knew, wished to avoid political controversy. The defendants assert that Conner's conduct thrust Reinhard into just such a controversy, arousing the ire of certain aldermen. In addition, when Reinhard asked Conner to refrain from repeating her conduct of May 12th, she replied that she would do the same thing again. Clearly, Conner and Reinhard disagree as to whether her comments at the Board of Ethics meeting should reasonably be interpreted as representing the view of the Comptroller's Office. Although Conner insisted that she would repeat the same behavior again, it is unclear whether she meant that she would voice her own individual opinion again, or whether she would speak as an employee of the Comptroller's Office again.

In *Hostrop v. Board of Junior College District No. 515*, we cautioned:

> *Pickering* should not be read to authorize the discharge of [a public employee] merely because he expresses an opinion that *could be interpreted* as a sign of disloyalty or an undermining of the confidence placed in him. Instead, *Pickering* holds that an employee's speech may be regulated only if a public entity can show that its functions are being substantially impeded by the employee's statements.

471 F.2d 488, 492 (7th Cir. 1972) (emphasis added), *cert. denied*, 411 U.S. 967 (1973).[6] This court has suggested that evidence of the actual effects of the speech at issue is necessary before a court can find that an employer's functions have been substantially impeded by the employee's speech. *See id.* at 492-93 & nn.12, 14. Such clear evidence is lacking here.

We find that a disputed issue of fact exists as to whether, and to what extent, Conner's conduct resulted in substantially damaging the working relationship between her and Reinhard. We realize that Conner's defiant answer may have caused Reinhard to question her loyalty to him. However, viewing Conner's statement that she would do the same thing again in the light most favorable to her, we find that she was merely reasserting her first amendment right to speak out on matters of public concern at meetings that are open for public comment. Since this is at most a statement that "could be interpreted" as undermining loyalty and confidence, under *Hostrop* this statement is not sufficient justification for Reinhard to fire Conner without actual evidence of an impaired working relationship.

e. Expression During Working Hours

As our review of case law indicates, the majority of analogous cases involve the speech of an off-duty public employee speaking out on a matter of public concern. We do not believe that the fact that Conner was working when she spoke should be a distinguishing factor in deter-

[6] In *Hostrop*, a college president was discharged after he prepared a confidential memorandum that proposed certain changes in the college's ethnic studies program. The memorandum was to be circulated among his administrative staff, but somehow became public. This court found that the suggested changes contained in the memo did not by themselves provide evidence of an impaired working relationship between the president and the board. 471 F.2d at 492-93.

mining whether her speech was protected. In *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), the Supreme Court extended first amendment protection to public employees who privately engage in speech regarding public concerns. The plaintiff, Bessie Givhan, was a public school teacher who frequently complained about various school policies, primarily racial segregation. Givhan presented her objections to the school principal in his private office during the school day. 439 U.S. at 412; 555 F.2d 1309, 1312-13 (5th Cir. 1977). Applying the *Pickering* balancing test, the Court concluded that Givhan's speech was entitled to first amendment protection. 439 U.S. at 414-15. Thus, *Givhan* implicitly held that first amendment protection extends to public employees who express their opinions during working hours as well as those who engage in speech while off-duty. *See* Schauer, *"Private" Speech and the "Private" Forum: Givhan v. Western Line School District*, 1979 Sup. Ct. Rev. 217, 247-48.

The Supreme Court has also expressly recognized the right of a public employee to speak out at a public meeting. In *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976), a nonunion teacher spoke out at a public school board meeting on a topic related to pending labor negotiations between the teachers' union and the school board. The Court affirmed the nonunion teacher's right to speak at the public meeting:

> [The teacher] addressed the school board not merely as one of its employees but also as a concerned citizen, seeking to express his views on an important decision of his government. We have held that teachers may not be "compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work." Where the State has opened a forum for direct citizen involvement, it is difficult to find justification for excluding teachers who make up

> the overwhelming proportion of school employees and who are most vitally concerned with the proceedings.

Id. at 174-75 (quoting *Pickering*, 391 U.S. at 568) (citations and footnote omitted).

Conner voiced her opinion at the Board of Ethics meeting only after the Board suspended the rules and invited public comment. If Conner had attended the meeting as a private citizen and given the same opinion, informing the Board that she was employed by the city, we believe that her speech clearly would have enjoyed first amendment protection under *Madison Joint School District*. The fact that she was taking the minutes at the time she spoke should not disturb that finding since we must accept for purposes of summary judgment Conner's version that she merely gave her personal opinion during a portion of the meeting open for public comment. Like Bessie Givhan, Conner happened to be at work when she expressed her opinion on an important matter of public interest. While we realize Conner's conduct may have placed her employer in an awkward position, that alone is not sufficient grounds upon which to discharge her; rather, it is just another factor that must be weighed in balancing the city's interest as an employer.[7]

We believe that the foregoing Supreme Court and Seventh Circuit precedent clearly established that Conner had a first amendment right to speak as a private citizen on a matter of public concern at the Board of Ethics meeting in May 1982. Given the wealth of closely analogous case law concerning the first amendment right of public employees to speak on matters of public interest, the defen-

[7] We do not mean to suggest that the fact that Conner was on duty at the time she spoke may not be highly relevant, especially to show whether she was insubordinate or whether her regular duties were disrupted. We merely hold that the fact that Conner was working *by itself* did not entitle her employer to retaliate against her for speaking about a matter of public interest in May 1982.

dants should have been on notice that their conduct was probably unlawful. Assessing the *Clark* factors in light of the case law existing in 1982, we do not believe that the defendants have made an adequate showing that Conner's speech was sufficiently disruptive so that a reasonable employer would have expected that he was justified in discharging her. Therefore, the district court erred in finding that the defendants were qualifiedly immune from suit.

B. Summary Judgment

The defendants urge that even if we find that they are not qualifiedly immune, we should hold that summary judgment was nevertheless proper under the *Mt. Healthy* test. Conner, however, contends that the case should go to trial because there are material factual issues in dispute. In reviewing a district court's grant of summary judgment, we may affirm on any ground that finds support in the record. *Wallace v. Greer*, 821 F.2d 1274, 1277 (7th Cir. 1987).

Under *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), a plaintiff cannot prevail in her claim of retaliatory discharge if the defendant can show that the decision to terminate the plaintiff would have been reasonable even in the absence of the protected conduct. A plaintiff must show that her conduct was constitutionally protected and that this conduct was a substantial or motivating factor in the decision to terminate her. The burden then shifts to the defendant to prove that the plaintiff would have been discharged even if the protected conduct had not occurred. *Id.* at 287.

Conner has met her burden of proving that her conduct at the Board of Ethics meeting was constitutionally protected. We must accept Conner's claim that she was merely voicing her personal opinion as to whether the taxpayers' money could be used for a particular purpose. Because that topic is a matter of public concern, it is entitled to first amendment protection. *See Pickering*, 391 U.S. at 571-72; *see also supra* note 3.

Conner must also show that her speech was a motivating factor in the defendants' decision to discharge her. The district court found that Conner was fired for insubordination because she insisted that she would do the same thing again. Thus, the district court accepted the defendants' argument that Conner was fired for refusing to take instructions, and that her conduct at the May 12th meeting was not a substantial factor in Reinhard's decision to fire her. However, as we noted earlier, there is a factual dispute as to whether Conner was defying legitimate instructions by her supervisor, or was merely reasserting her first amendment right to speak out on matters of public concern. The district court acknowledged the dispute, but nevertheless did "not believe that the difference in interpretation amount[ed] to a genuine issue of material fact." We disagree; the interpretation that the court accepts could determine whether or not Reinhard was justified in discharging Conner. This is indeed a genuine issue of material fact that we must leave to the fact-finding expertise of a jury.

Even if we were to find that the undisputed facts viewed in the light most favorable to Conner indicated that her speech was a substantial factor in Reinhard's decision to terminate her, we would then need to determine whether Reinhard had any other sufficient reason to discharge Conner. The parties, however, strongly disagree as to whether Reinhard had any justification for firing Conner other than the events related to the Board of Ethics meeting. Because the parties contest the proper interpretation of Conner's reply to Reinhard's letter of reprimand and Reinhard's motivation in deciding to discharge Conner, the district court's grant of summary judgment cannot be sustained. *See DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326, 329 (7th Cir. 1987) (summary judgment improper where genuine issues of material fact exist).

C. Claim Preclusion

The defendants also argue that Conner's earlier action against the City of Green Bay precludes her from bringing suit against them. Because Conner brought the earlier

case against the city in federal district court, the federal rules of claim preclusion govern. *In re Energy Coop., Inc.*, 814 F.2d 1226, 1230 (7th Cir.), *cert. denied*, 108 S. Ct. 294 (1987). For the doctrine to apply, three elements must exist: (1) an identity of the parties or their privies; (2) an identity of the causes of action; and (3) a final judgment on the merits. *Id.* (citing *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981)).

The defendants contend that the parties to the separate actions, while not identical, are in privity with one another. In the earlier suit, Conner sued the City of Green Bay. In the present action, however, Conner is suing two city officials in their personal capacities.[8]

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[8] In her complaint, Conner asked for "judgment against the defendants, individually and collectively." The terms "personal capacity" or "official capacity" do not appear in the complaint. In plaintiff's brief on appeal, however, Conner claims that she is suing the defendants "in their individual and official capacity [sic]."

This court has repeatedly encountered ambiguous pleadings that do not clearly indicate whether an official is being sued in his official or personal capacity. To dispel some of the confusion, we created a presumption that a section 1983 claim against a public official is an official-capacity suit. *Kolar v. County of Sangamon*, 756 F.2d 564, 568 (7th Cir. 1985). While the *Kolar* presumption is a useful tool to aid judges, it is not conclusive. *See Duckworth v. Franzen*, 780 F.2d 645, 649 (7th Cir. 1985), *cert. denied*, 107 S. Ct. 71 (1986). A court must also consider the manner in which the parties have treated the suit. *Shockley v. Jones*, 823 F.2d 1068, 1071 (7th Cir. 1987). *See Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985); *Brandon v. Holt*, 469 U.S. 464, 469-71 (1985).

The parties to the present action clearly consider this suit as one seeking to impose personal liability upon the defendants. The defendants have raised the defense of qualified immunity, a defense that is only applicable in a personal-capacity suit. *Graham*, 473 U.S. at 166-67. The plaintiff does not assert that the defendants followed a policy or custom of the City of Green Bay, a necessary showing in an official-capacity suit. *Id.* at 166 & n.12. In addition, the plaintiff has named the estate of Richard Zolper as a defendant, which would be completely unnecessary in an official-capacity suit. *Id.* at 166 n.11. Therefore, we will honor the parties' obvious intentions and treat this suit as one alleging personal liability of the defendants.

An official-capacity suit is really just another way of suing the government. *See Beard v. O'Neal*, 728 F.2d 894, 897 (7th Cir.), *cert. denied*, 469 U.S. 825 (1984). Therefore, a city official sued in his official capacity is generally in privity with the municipality. *Lee v. City of Peoria*, 685 F.2d 196, 199-200 n.4 (7th Cir. 1982); C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4458, at 506 (1981).

A government official sued in his personal capacity, however, presents a different case. If the plaintiff prevails against the official, the official must satisfy the judgment out of his own pocket, rather than having the government entity pay the damages. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985). In addition, different legal theories may be necessary to prove liability in a personal-capacity, as opposed to an official-capacity, case. Also, different defenses are available to a defendant who is sued in his personal capacity. *Id.* at 166-67. Therefore, courts do not generally consider an official sued in his personal capacity as being in privity with the government. *Headley v. Bacon*, 828 F.2d 1272, 1279 (8th Cir. 1987); *Roy v. City of Augusta, Me.*, 712 F.2d 1517, 1521-22 (1st Cir. 1983); *see Kunzelman v. Thompson*, 799 F.2d 1172, 1178 (7th Cir. 1986); *see also* C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4458, at 508 (1981) ("The relationships between a government and its officials justify preclusion only as to litigation undertaken in an official capacity. Thus a judgment against a government does not bind its officials in subsequent litigation that asserts a personal liability against the officials.").

The Seventh Circuit has also taken this approach. For example, in *Beard v. O'Neal*, 728 F.2d 894 (7th Cir.), *cert. denied*, 469 U.S. 825 (1984), Beard sued FBI Agent Mitchell for damages relating to the murder of her brother. In a separate action, Beard also sued an FBI informant, Mitchell's supervisors, and the acting director of the FBI. This court rejected Beard's argument that all FBI officials are in privity for purposes of claim preclusion. Although we recognized that FBI agents sued in their official ca-

pacities would be in privity with each other, where government officials are sued in their personal capacities, privity does not exist. *Id.* at 897.

Garza v. Henderson, 779 F.2d 390 (7th Cir. 1985), is a similar case, although it deals with the related doctrine of issue preclusion, rather than claim preclusion. The plaintiff in *Garza* originally brought a habeas corpus proceeding against the warden of a prison. The plaintiff subsequently initiated a civil rights action, naming as defendants members of a prison discipline committee. The committee members were sued in both their official and personal capacities. The plaintiff attempted to prevent the committee members from relitigating an issue that was decided in the earlier habeas action against the warden. This court, however, held that issue preclusion could not apply. Although both the warden and the committee members were officials of the federal government, the government was not the only litigant to the action. Rather, as we explained, "the [committee] members, who are being sued in their own individual capacities, are also separate and independent defendants in their own right." *Id.* at 394. Therefore, issue preclusion could not apply because the committee members did not have an opportunity to defend themselves in the earlier habeas action.

In support of their argument that privity between the city and the present defendants does exist, the defendants rely on *Mandarino v. Pollard*, 718 F.2d 845 (7th Cir. 1983), *cert. denied*, 469 U.S. 830 (1984). In *Mandarino*, the plaintiff sued the Village of Lombard in Illinois state court. The plaintiff later brought a federal action against the village, the village mayor, the village manager, and several trustees of the village, suing the individuals in both their official and personal capacities. The defendants in the federal action claimed that the earlier state court judgment in favor of the village barred the federal suit under the principles of claim preclusion. This court agreed. On the issue of privity, we stated: "A government and its officers are in privity for purposes of res judicata." *Id.* at 850. The court then cited *Sunshine Anthracite Coal*

Co. v. Adkins, 310 U.S. 381 (1940); *Church of the New Song v. Establishment of Religion on Taxpayers Money*, 620 F.2d 648 (7th Cir. 1980), *cert. denied*, 450 U.S. 929 (1981); and *Lambert v. Conrad*, 536 F.2d 1183 (7th Cir. 1976).

Those cases, however, do not hold that officers sued in their personal capacities are in privity with the government. Courts have distinguished *Sunshine Anthracite Coal* as actually referring to the doctrine of issue preclusion, which does not require the same mutuality of parties that is necessary for claim preclusion. *See Beard v. O'Neal*, 728 F.2d at 897; *Headley v. Bacon*, 828 F.2d at 1277. In addition, the *Church of the New Song* and *Lambert* opinions did not indicate whether the officials in those cases were sued in their personal or official capacities, and therefore did not directly address the question of privity between a government entity and officials sued in their personal capacities.

To the extent that the *Mandarino* opinion suggests that officials sued in their personal capacities are necessarily in privity with the government, we cannot agree. In *Mandarino*, however, the court was required to apply the claim preclusion laws of Illinois in deciding whether the earlier Illinois judgment would have preclusive effect in the later federal action. *Allen v. McCurry*, 449 U.S. 90, 96 (1980); *Lee v. City of Peoria*, 685 F.2d at 198. In addition to the *Sunshine Anthracite Coal*, *Church of the New Song*, and *Lambert* cases, the *Mandarino* court cited two Illinois cases to support its proposition that the village officials were in privity with the village. *See Mandarino*, 718 F.2d at 850 (citing *Consolidated Distilled Prods. v. Allphin, Inc.*, 73 Ill. 2d 19, 382 N.E.2d 217, 21 Ill. Dec. 853 (1978), and *City of Elmhurst v. Kegerreis*, 392 Ill. 195, 64 N.E.2d 450 (1946)). Because the *Mandarino* court was applying Illinois law, *Mandarino* is not controlling in this case where we must apply federal rules of claim preclusion.

Conner is suing the defendants in their personal capacities. Under federal law, we find that they are not in privity with the City of Green Bay. Therefore, Conner's earlier suit against the city does not preclude her from pursuing the present action.

D. Liability of Defendant Zolper

Finally, Conner asserts that the district court erred in concluding that there was insufficient evidence to hold defendant Zolper liable for Conner's dismissal. In its order granting summary judgment, the district court found that "there is no basis for any cause of action against Zolper, except for the unsupported speculation of Conner that he went into Reinhard's office, slammed the door, and began to talk about her."

In her motion for reconsideration, the plaintiff directed the district court's attention to the testimony of Sheila Cody O'Connor. At the earlier trial against the City of Green Bay, O'Connor testified to a conversation she had had with defendant Reinhard a few days after the Board of Ethics meeting. O'Connor stated that Reinhard told her Zolper had visited him that morning and was upset with Conner's behavior at the May 12th meeting. Reinhard said that Zolper wanted Conner fired, and if she was not fired, Zolper would have her position eliminated at budget time. Although O'Connor claims that Conner was also present, Conner does not recall this conversation. The district court denied Conner's motion for reconsideration.

In reviewing a grant of summary judgment, we must review the undisputed facts, drawing all reasonable inferences in the light most favorable to the nonmovant. *Donald v. Polk County*, 836 F.2d 376, 379 (7th Cir. 1988); *see Munson v. Friske*, 754 F.2d 683, 690 (7th Cir. 1985) ("If a study of the record reveals that inferences contrary to those drawn by the trial court might be permissible, then the summary judgment should be reversed."). Although Conner does not remember the conversation between Reinhard and O'Connor, the defendants do not dispute that

the conversation took place. Viewed in the light most favorable to Conner, O'Connor's testimony tends to show that Zolper may have been a motivating force in Reinhard's later decision to discharge Conner. For liability under section 1983, direct participation by a defendant is not necessary. Any official who "causes" a citizen to be deprived of her constitutional rights can also be held liable. The requisite causal connection is satisfied if the defendant set in motion a series of events that the defendant knew or should reasonably have known would cause others to deprive the plaintiff of her constitutional rights. *Tidwell v. Schweiker*, 677 F.2d 560, 569 (7th Cir. 1982), *cert. denied*, 461 U.S. 905 (1983); *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978).

In *Soderbeck v. Burnett County, Wisconsin*, 752 F.2d 285 (7th Cir.), *cert. denied*, 471 U.S. 1117 (1985), a plaintiff brought suit under section 1983, alleging that she was discharged from her job in the sheriff's office in violation of her first amendment rights. The defendants included the county sheriff, three members of the county law enforcement committee, and the county itself. The district court directed a verdict for the committee members on the ground that the committee had no legal authority to fire the plaintiff. We reversed and held that it was immaterial whether the committee members could legally discharge the plaintiff. The relevant inquiry was whether the jury could reasonably find that the committee members participated in the unconstitutional discharge. *Id.* at 293. Because we found that the jury could reasonably have found that the committee ratified the sheriff's decision to unlawfully discharge the plaintiff, the case was remanded for a new trial. *Id.* at 294.

Similarly, in *Miller v. City of Mission, Kansas*, 705 F.2d 368 (10th Cir. 1983), a plaintiff sued under section 1983, claiming that he was discharged from his job as a city policeman in violation of his constitutional rights. The plaintiff named as defendants the mayor and several city council members. The Tenth Circuit found that the city council members could be held individually liable for plaintiff's unconstitutional discharge if they either directly par-

ticipated in the termination process or set in motion a series of acts by others that they reasonably should have known would result in the plaintiff's unconstitutional dismissal. *Id.* at 375. Although the mayor was the official who actually discharged the plaintiff, the court found that "the mayor would not have dismissed [the plaintiff] without a hearing absent the support and encouragement of defendant council members." *Id.* at 376. Thus, the plaintiff had a sufficient basis on which to hold the council members liable.

If the jury accepts as true the testimony of O'Connor, they reasonably could find that defendant Zolper motivated Reinhard's decision to discharge Conner. The defendants point out that, while a letter of reprimand followed Zolper's visit, Reinhard did not decide to terminate Conner until her defiant answer that she would do the same thing again. This takes us back to the disputed interpretation of Conner's remark. Whether Reinhard was responding to Zolper's pressure and decided to terminate Conner because she insisted that she would not cease exercising her first amendment rights is an issue of fact for the jury. Drawing all reasonable inferences in the light most favorable to Conner, we cannot say that Zolper is entitled to summary judgment as a matter of law. Because a jury could reasonably find Zolper liable for Conner's discharge, we reverse the grant of summary judgment as to defendant Zolper. *See Munson*, 754 F.2d at 690 (summary judgment proper only if no reasonable jury could return a verdict for the plaintiff).

III. CONCLUSION

We find that the district court erred in granting summary judgment for the defendants on the basis of qualified immunity. Because there are material factual issues in dispute, we must remand this case for trial. We also find that the doctrine of claim preclusion does not bar Conner from pursuing this action. Finally, we reverse the district court's grant of summary judgment as to defendant Zolper.

REVERSED AND REMANDED

CUDAHY, *Circuit Judge*, concurring in the result:

I agree with the decision to reverse the summary judgment for the defendants in this case and with most of the majority's reasoning en route to this result. I disagree, however, with the majority's treatment of the insubordination question. The majority seems to assess Conner's response to Reinhard's letter as if the only question before us were whether Reinhard is entitled to summary judgment on the merits under *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). In my view, the district court's decision (mem. op. at 1, 5-8 (Mar. 26, 1987)), and the parties' arguments on appeal (Brief of Defendants-Appellees at 19-20) also present a more difficult question: whether, accepting that a jury could find a constitutional violation on the facts pleaded by Conner, Reinhard's contention that he fired Conner for insubordination after the meeting rather than for her speech during the meeting entitles him to qualified immunity.

The qualified immunity question is difficult because *Mt. Healthy* apparently requires an investigation whether permissible motives for firing an employee were sufficient, in the mind of the defendant, to bring about the plaintiff's termination. 429 U.S. at 285-87; *Nekolny v. Painter*, 653 F.2d 1164, 1166-68 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982). The Supreme Court has indicated that qualified immunity claims are to be tested under a purely objective standard, *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982); but it "has not explained how this objective standard is to be employed when the plaintiff's claim depends on the state of mind of the defendant." *Benson v. Allphin*, 786 F.2d 276 n.19 (7th Cir.), *cert. denied*, 107 S.Ct. 172 (1986).

The courts of appeals for the Ninth and District of Columbia Circuits, however, have confronted qualified immunity defenses in section 1983 cases involving allegations of unconstitutional motives. Both have determined that where the legality of the actions of a section 1983 defendant depends upon the defendant's motive or intent, the qualified immunity inquiry cannot be confined to a pure-

ly objective view of a defendant's actions. *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1049-51 (9th Cir. 1988) (intentional discrimination on the basis of race); *Martin v. District of Columbia Metro. Police Dep't*, 812 F.2d 1425, 1431-33 (D.C. Cir. 1987) (malicious prosecution);[1] *Hobson v. Wilson*, 737 F.2d 1, 26-29 (D.C. Cir. 1984) (conspiracy to violate first amendment rights of political protesters), *cert. denied*, 470 U.S. 1084 (1985); *see also Goodwin v. Circuit Court*, 729 F.2d 541, 546 (8th Cir. 1984) (upholding district court refusal to give qualified immunity instruction in case involving claim of "invidious sex discrimination").[2]

I believe that the case before us requires us to decide how *Harlow* applies to section 1983 claims that raise issues of illegal intent. Following the well-reasoned decisions of the Ninth and District of Columbia Circuits, I would conclude that Conner's specific allegations that im-

[1] Soon after *Martin* was decided, the D.C. Circuit granted rehearing en banc and vacated part IV of the majority opinion, which discussed plaintiff's burden to support allegations of illegal motive with specific facts and the availability of discovery against government officials to obtain the necessary facts. *Martin v. District of Columbia Metro. Police Dep't*, 817 F.2d 144 (D.C. Cir. 1987). Subsequently, however, the court reversed its decision to grant rehearing en banc and restored part IV of the original decision. *Barlett ex rel. Neuman v. Bowen*, 824 F.2d 1240 (D.C. Cir. 1987).

[2] *Miller v. Solem*, 728 F.2d 1020 (8th Cir.), *cert. denied*, 469 U.S. 841 (1984), held that an entirely objective test could be applied to an eighth amendment claim of deliberate indifference. *Id.* at 1025. *Compare Albers v. Whitley*, 743 F.2d 1372, 1376 (9th Cir. 1984) (objective test for qualified immunity unavailable where plaintiff alleges deliberate indifference), *rev'd on other grounds*, 475 U.S. 312 (1986). The Eighth Circuit adhered to an "objective" approach by evaluating the defendant's qualified immunity claim under a "reckless disregard" standard—a close analog to deliberate indifference. *Miller*, 728 F.2d at 1025. No such objective substitute suggests itself for the intent elements of intentional discrimination, malicious prosecution, and conspiracy, the claims addressed in the Ninth and District of Columbia Circuit cases cited in the text.

permissible motives were essential to Reinhard's discharge decision preclude summary judgment on qualified immunity grounds. I therefore arrive at the same outcome as the majority, though via a somewhat longer and rockier route.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

BARBARA CONNER,

Plaintiff,

v. Civil Action No. 85-C-719

RUDY G. REINHARD and THE ESTATE OF RICHARD J. ZOLPER, deceased, through and by IRENE M. ZOLPER, the Personal Representative of the ESTATE OF RICHARD J. ZOLPER,

Defendants.

O R D E R

This is a civil rights action in which Barbara Conner alleges that her employment with the City of Green Bay was terminated in violation of her constitutional right to freedom of speech. The defendants have filed a motion for summary judgment based on qualified immunity.

The undisputed facts, taken from documents in the record and three

transcripts of the testimony of Conner, are as follows. Barbara Conner was first employed as a Clerk Steno II for the Comptroller's Office of the City of Green Bay in February 1982. The first six months of her employment were to be probationary. At the end of six months, her employment was to be continued if both parties agreed. Her immediate supervisor was Rudy Reinhard. Richard Zolper, now deceased, was an alderman for the City of Green Bay.

In addition to her regular duties, Conner also took minutes for the City Board of Ethics. She was taking the minutes of a meeting on May 12, 1982, at which there was a discussion of the possibility of using the city contingency fund for an investigation of an alderman named Guy Zima. For a time during the meeting, the rules were

suspended to allow interested parties to speak. Conner spoke up. Her transcription of what was said between her and Thomas Camilli, a member of the Ethics Board, is as follows:

Conner: I work for Rudy and I know that the Contingency Fund is not for this purpose.

Camilli: Your name, please, for the record.

Conner: Barbara Conner, 215 North Van Buren. I'm a citizen of Green Bay.

Camilli: You're also a city employee?

Conner: I'm a city employee and I have some concern about how we spend tax money.

Camilli: And you're aware of the Contingency Fund because of your work in the Comptroller's Office, is that correct?

Conner: Right. And I take the minutes of the Finance Committee meeting and I know the reticence with which they dip into the Contingency Fund.

Richard Zolper was at the meeting and appeared to be angry with Conner. At some point, possibly on May 18, 1982, Zolper came into Reinhard's office and, in Conner's view, slammed the door shut. Conner assumed that they were talking about her, but no one other than the participants witnessed the conversation.

A letter dated May 19, 1982, from Reinhard to Conner reads as follows:

> In reference to the remark concerning the use of the Contingency Fund attributed to you at the May 12th, 1982, Board of Ethics Meeting, I must advise you that it was a case of poor judgment on your part when you expressed the views of the Comptroller's Office while acting as Recording Secretary for that Committee. If you had been attending the Hearing not as the Recording Secretary but as a private citizen your personal viewpoint would have been more appropriate.
>
> In the future I would caution you, while acting as the Recording Secretary, not to speak for the Comptroller's Office unless questioned directly.

> I am sorry this situation arose and hope to avoid a similar situation in the future.

Conner asked Reinhard what the letter meant. He advised her not to speak on his behalf without prior authorization. She said she would do the same thing again. Shortly thereafter, Conner informed the press that she had been fired.

In addition, she wrote a long letter, dated May 20, 1982, to Reinhard. In it she expressed her dismay at Reinhard's having "no consideration for my right as an individual to express an opinion..." She stated that if he checked the recording of her remarks, it would be clear that she was speaking as a citizen of Green Bay and not expressing the view of the Comptroller's Office:

> I do not know the view of the Comptroller's Office. I did check with Lou Marchetti, chairman of the Finance Committee, about the

> use of the Contingency Fund, and as I had surmised from being present at Finance Committee meetings, the Contingency Fund is for unforeseen emergencies and Acts of God, such as severe winters, floods, equipment breakdowns, etc. It is not for flying to Louisiana oil rigs to check on past activities of Councilman Guy Zima. It is not for personal vendettas.

Conner laments what has happened to government in Green Bay:

> We are not paying attention to whom we vote for. How many people have witnessed their representatives in action at City Council meetings (open to the public, every first and third Tuesday, 7:30 pm at City Hall, 100 N. Jefferson, second floor)?

Conner also states that she takes the denial of freedom of speech seriously and is "willing not only to lose my job for it, but to die for it." She didn't die, but her employment was terminated on May 24, 1982.

The defendants have moved for summary judgment on the basis that they have a qualified immunity from suit.

In Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Supreme Court stated that an official had a qualified immunity unless he knew or reasonably should have known that an action he took would violate the constitutional rights of the plaintiff. The standard for evaluating a qualified immunity was changed, in most cases, from a standard which involved both a subjective and objective element to an objective standard. Thus, the official's subjective belief that he was acting properly became irrelevant. At the same time, then, the issue became one which could be decided and, in fact, should be decided on motions prior to trial. See also Mitchell v. Forsyth, 105 S. Ct. 2806 (1985). The defendants

here are entitled to a qualified immunity unless they should have known that their conduct violated Conner's first amendment rights.

There is no real dispute, I think, here between the parties as to what the law was in 1982. In Pickering v. Board of Education, 391 U.S. 563 (1968), the Court determined that in cases in which an employee was discharged because of the exercise of his free speech rights, the problem is to arrive "at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Then, in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), the Court states that in

cases such as this the burden is properly upon the employee to show that the conduct was constitutionally protected and that it was a substantial factor in the employment decision. That being done, the employer must show by a preponderance of the evidence that it would have reached the same decision in the absence of the protected conduct. Factors relevant to the government's interest in promoting efficient governmental services include the need to maintain discipline, the need for confidentiality, the need to curtail conduct which impedes the employee's competent performance of his duties, and the need to encourage close and personal relationships between the employee and his superiors. Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972).

The dispute here comes in defining what Conner did and why she was fired. Conner claims that what happened was that she expressed her views as a citizen at a public meeting and for that she was fired. The defendants, on the other hand, contend that she expressed her views at a public forum in a manner in which one could think that she was speaking on behalf of a governmental agency without authorization to do so. Then when she was told not to speak for Reinhard in the future, she maintained that she would do the same thing again. Thus, she was fired for insubordination, rather than for expressing her views.

I do not believe that the difference in interpretation amounts to a genuine issue of material fact. The plaintiff does not dispute that the entire series of events occurred.

If there had been no question that Conner was speaking as a private citizen, and if she were clearly fired for speaking out, her constitutional rights would have been violated and the defendants should have known that. However, Conner's statement at the meeting easily allows for at least a misunderstanding that she is speaking on behalf of an official agency. She states that she takes the minutes of the Finance Committee meeting and knows the reticence with which they dip into the Contingency Fund. At her deposition taken May 14, 1984, page 40, she admits that one could mistakenly think she was speaking on behalf of the Comptroller's Office. In her letter to Reinhard, in which she professes not to have been speaking for the Comptroller's Office, she nevertheless goes on to state that

she has checked with the chairman of the Finance Committee about the use of the fund and then states, just as she had surmised, it was not for the use which the committee had intended.

Whether or not Conner was intending to speak for the Comptroller's Office, her words and actions at the very least allow Reinhard to assume that people could think she was. That being the case, he is entitled to ask her not to speak on behalf of his agency in the future. It is only after his request that she not speak on his behalf and her statement that she would do the same thing again that she was dismissed. Of these facts, Reinhard's qualified immunity from suit is not defeated. Accordingly, he is entitled to dismissal from the action.

The only allegation against Zolper is that he attempted to influence Reinhard in taking the actions he took. However, on the facts which are submitted in connection with the summary judgment motion, there is no basis for any cause of action against Zolper, except for the unsupported speculation of Conner that he went into Reinhard's office, slammed the door, and began to talk about her. That is insufficient.

IT IS THEREFORE ORDERED that this action is DISMISSED.

Dated at Milwaukee, Wisconsin, this 26 day of March, 1987.

BY THE COURT:

/s/ Terence Evans
TERENCE T. EVANS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

BARBARA CONNER,

Plaintiff,

v.

Civil Action
No. 85-C-719

RUDY G. REINHARD and THE ESTATE OF RICHARD J. ZOLPER, deceased, through and by IRENE M. ZOLPER, the Personal Representative of the ESTATE OF RICHARD J. ZOLPER,

Defendants.

DECISION and ORDER

This is a civil rights action in which Barbara Conner alleges that her employment with the City of Green Bay was terminated in violation of a constitutional right to freedom of speech. Defendants have filed a motion for summary judgment, seeking dismissal of the complaint. They contend that the action is barred by the doctrine of res judicata.

On March 11, 1983, Conner brought a previous action in this district in which the city of Green Bay was the only named defendant. In that action (which was assigned to Chief Judge John W. Reynolds) she alleged that her termination as a probationary clerk-steno in the Comptroller's Office of the City of Green Bay was terminated in violation of her constitutional right to freedom of speech. On July 31, 1984, she requested leave of the court to join Rudy Reinhard, the City Comptroller, as a defendant. The attempt to join Reinhard was made one day before the last scheduled day for dispositive motions. The request to join Reinhard was denied by the court as untimely. The matter proceeded to trial on November 5, 1984.

In the second day of trial, the city moved for a directed verdict on the grounds that Conner had failed to show a custom or policy which could result in municipal liability. The court granted the motion and directed a verdict in favor of the city on November 6, 1984.

On March 25, 1985, writing in regard to the defendant's motion for attorney's fees, the court stated:

> In this case, plaintiff may have become aware that the evidence gathered in discovery was insufficient to support a claim that her firing was effected pursuant to a custom or policy, and moved to amend her complaint for this reason. The motion was denied as untimely. One can only speculate what result would have followed if the amendment had been allowed.

Citing Lee v. The City of Peoria, 685 F.2d 196 (7th Cir. 1982) and Mandarino v. Pollard, 718 F.2d 845 (7th Cir. 1983), the defendants here claim that res judicata bars the present action.

Conner's best argument against defendants' position is that the cause of action against the city was different because under Monell v. Dept. of Social Services, 436 U.S. 658 (1978), to prove a case against the city, she had to show that the action was a result of a city policy or custom; whereas that showing is not necessary against the individual defendants.

Conner's argument does not address the fact that res judicata applies to any cause of action which was litigated or could have been litigated in the previous action. See Lee, supra. Were it not for the fact that Conner had attempted to add Reinhard in the previous action, it is clear that res judicata would bar the present suit.

Neither party addressed what effect her attempt to join Reinhard should

have. Does it, for instance, mean that she could not have litigated that cause of action in the previous case and therefore res judicata does not apply? Or, because the request was denied as untimely, does it mean that by her dilatory conduct she forfeited the right to bring the cause of action?

Only because she attempted over three months before trial to add Reinhard as a defendant in the previous case and the trial judge hinted that the result might have been different had individuals been named, I am denying the defendants' motion for summary judgment. The denial applies to the motion of both defendants, as there is no indication that leave to add Zolper would have met with any different fate than Conner's attempt to add Reinhard.

IT IS THEREFORE ORDERED that defendants' motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that a conference call will be held in this action on May 27, 1986, at 8:45 a.m.

Dated at Milwaukee, Wisconsin, this 18 day of April, 1986.

BY THE COURT:

/s/ Terence Evans
TERENCE T. EVANS
UNITED STATES DISTRICT JUDGE

JUDGMENT - ORAL ARGUMENTS

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 19, 1988.

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. HUBERT L. WILL, Sr. District Judge*

BARBARA CONNER,
Plaintiff-Appellant,

No. 87-1940 vs.

RUDY G. REINHARD, et al.
Defendants-Appellees.

Appeal from the United States
District Court for the
Eastern District of Wisocnsin
No. 85-C-719
TERENCE T. EVANS, Judge.

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and the case is REMANDED, in accordance with the opinion of this Court filed this date.

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*The Honorable Hubert L. Will, Senior District Judge for the Northern District of Illinois, is sitting by designation.

JUDGMENT IN CIVIL CASE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

BARBARA CONNER

V.

RUDY G. REINHARD, et al.

85-C-179

Terence T. Evans

____ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

__XX__ Decision by Court. This action came on for consideration before the Court with the judge named above presiding and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

This action is dismissed.

CLERK	DATE
Sofron B. Nedilsky	3/26/87
(BY) DEPUTY CLERK	
/s/	

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

BARBARA CONNER,

Plaintiff,

v. Case No. 85-C-0719

RUDY G. REINHARD and THE ESTATE OF RICHARD J. ZOLPER, deceased, through and by IRENE M. ZOLPER, the Personal Representative of the ESTATE OF RICHARD J. ZOLPER,

Defendants.

COMPLAINT

The Plaintiff, Barbara Conner, by her attorneys Lawton & Cates and Richard V. Graylow, alleges and shows the following:

PARTIES

1. Plaintiff, Barbara Conner, is an adult citizen of the United States who, at all times material hereto, resided at 215 N. Van Buren, Green Bay, Wisconsin.

2. At all times material hereto defendant Rudy G. Reinhard, was the Finance Director and Comptroller for the City of Green Bay.

3. At all times material hereto the plaintiff was employed as a probationary Clerk-Steno II in the Comptroller's Office, City Hall, Green Bay, Wisconsin.

4. A. At all times material hereto Richard J. Zolper was a duly elected Alderman in the City of Green Bay and at all times material hereto was the duly elected President of the Common Council.

B. On information and belief, Richard J. Zolper died on or about June 4, 1984, in the City of Green Bay, Wisconsin.

C. The duly appointed personal representative of the Estate of Richard J. Zolper was and continues to be Irene M. Zolper.

JURISDICTION

5. This Court has original jurisdiction of the cause pursuant to 28 USCA Sec. 1331 and 42 USCA Sec. 1981, et. seq., the Federal Civil Rights Act. The action seeks damages and reinstatement for violation(s) of Constitutional right(s) and guarantee(s).

CLAIM FOR RELIEF

6. The Plaintiff, Barbara Conner, was hired by the City of Green Bay as a probationary Clerk-Steno II on February 9, 1982. She worked in the Comptroller's Office. Her supervisor was defendant Rudy G. Reinhard. On May 12, 1982, the Plaintiff attended a meeting of the Board of Ethics of the City in order to take the minutes of the meeting. The regular rules of order were suspended to allow all persons to

speak on the issue(s) then confronting the Board. A true and correct copy of the Board of Ethics Minutes of Wednesday, May 12, 1982, is attached hereto, made a part hereof and incorporated by reference as Plaintiff's Exhibit No. One (1).

7. Pursuant to this rule of suspension, the Plaintiff took the opportunity to express her opinion about the subject then being discussed; ie. the use of the Contingency Fund. She was, at all times, speaking and expressly stated that she was speaking as a Citizen and Tax Payer of the City of Green Bay.

8. On May 19, 1982, the Plaintiff received a formal letter of reprimand from Defendant Reinhard for expressing her opinion at the meeting. A true and correct copy of said Letter of Reprimand

is attached hereto, made a part hereof and incorporated by reference as Plaintiff's Exhibit No. Two (2).

9. Said letter of suspension was followed by letter of termination dated on or about May 12, 1982. Said letter was prepared by or under the direction of Defendant Reinhard. A true and correct copy of same is attached hereto, made a part hereof and incorporated by reference as Plaintiff's Exhibit No. Three (3).

10. The Plaintiff's comment or comments at the meeting of the Board of Ethics was/were the sole and determinative factor in the decision of Defendant Reinhard to terminate the Plaintiff.

11. The reprimand and termination of the Plaintiff by Defendant Reinhard was unlawful, improper and in violation of

the Constitutional Rights and guarantees of the Plaintiff to speak freely as insured by the Constitutuion of the United States of America.

12. Richard J. Zolper attended the meeting of the Board of Ethics.

13. Richard J. Zolper wanted and urged the Board to use the Contingency Fund for investigative purposes.

14. Plaintiff Conner opposed the use of the Contingency Fund for this particular purpose and so stated.

15. Richard J. Zolper heard the comments of Plaintiff Conner.

16. Richard J. Zolper became infuriated, angry and upset with and because of the comment(s) of Plaintiff Conner.

17. On information and belief Richard J. Zolper instructed Defendant Reinhard to terminate the Plaintiff or

alternatively he threatened to cause her position to be eliminated by and through the budgetary process of the City of Green Bay.

18. On information and belief Defendant Reinhard acted pursuant to Zolper's request and terminated Plaintiff.

19. The actions of Richard J. Zolper and Defendant Reinhard as described herein constitute an unlawful conspiracy to deny and in fact did deny the Plaintiff constitutionally protected rights and guarantees.

20. The actions of both Zolper and Defendant Reinhard were done under color of law, regulation, custom or usage.

21. The actions of both Zolper and Defendant Reinhard were done intentionally, wantonly, recklessly and in willful disregard of the

Constitutional rights and guarantees of Plaintiff.

22. Demand is herewith made for trial by jury.

WHEREFORE, Plaintiff, Barbara Conner, demands judgment against the defendants, individually and collectively for back pay, restoration of employment and restoration of all fringe benefits, together with compensatory and punitive damages in the amount of One Million Dollars ($1,000,000.00).

Dated and signed in Madison, Wisconsin, this 9th day of May, 1985.

LAWTON & CATES

By:/s/ Richard V. Graylow
RICHARD V. GRAYLOW
110 East Main Street
Madison, Wisconsin 53703

Attorneys for Plaintiff

BOARD OF ETHICS

Wednesday, May 12, 1982
9:00 PM - Room 604
City Hall, Green Bay

MEMBERS PRESENT: Chairman P. Dale Ives, Ernest Bellin, Thomas Camilli, Deana Naug and Ronald Venci.

OTHERS PRESENT: City Attorney James Simmonds; Assistant City Attorney Tim Kelley; Alderman Guy Zima; his attorney Joseph M. Recka; City Investigator Frank Guarascio; Aldermen Edward Bodart, James Demeny, Gordon Kropp, Joseph Marinan, Richard Zolper; members of the news media; and several citizens.

Chairman Ives called the reconvened meeting to order in open session. He stated that the Board has received a complaint from Aldermen Marinan and Zolper, and he called on City Attorney Simmonds for explication.

PLAINTIFF'S EXHIBIT NO. 1

Simmonds stated that the Board has received a second complaint regarding the defendant Guy Zima. Attached to the complaint is an unsigned unsworn document of several pages that make allegations. This document cannot be received or utilized for anything. Three choices exist: (1) Place it on file, (2) Instruct someone to order the complainant to appear for examination, or (3) Send someone to find him on an oil rig in Louisiana. If (3), then you have to request a budget from Common Council to send people down to take testimony. If (2), you have someone sign a subpoena with a blank date in it and if he's found within the limits of the State of Wisconsin, we can serve him with a subpoena and have him swear to the statements. If (1), file it and forget about it. The statement has to

be sworn to and attached to the complaint before any action can be taken.

Consideration was given to approaching the City Council for a budget for a proper investigation. It's one way to get some direction, to see how much they're willing to spend. Consideration was given to receiving and placing the complaint on file until the information upon which the complaint is based can be substantiated with a sworn statement. In that case we issue a blank subpoena, have the allegations sworn to, and organize an Ethics Board meeting organized as soon thereafter as possible.

Request was made for a redraft of the complaint to include the Federal and State laws that have been violated by which specific acts, once the

allegations have been sworn to. Then if a hearing is required, we serve the complaint.

It was moved and seconded to suspend the regular rules of order so as to hear the complainants. Motion passed unanimously.

Aldermen Marinan and Zolper were called to the meeting table. Question was asked whether they could substantiate their information. Reply was affirmative. Marinan asked whether this Board would be willing to provide his witness with police protection, and whether it was willing to go to the City Council requesting a budget to conduct an investigation; if not, no action could be taken. Marinan stated that if the City Council refuses a budget for the investigation he would be willing to pay for it out of his own pocket.

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Respectfully submitted,

/s/ Barbara Conner

Barbara Conner
Acting Recording Secretary

May 14, 1982

5-19-82

TO: Barbara Conner

FROM: Rudy G. Reinhard, /s/ RGR
Director of Finance

In reference to the remark concerning the use of the contingency fund attributed to you at the May 12th, 1982, Board of Ethics Meeting, I must advise you that it was a case of poor judgment on your part when you expressed the views of the Comptroller's Office while acting as Recording Secretary for the Committee. If you had been attending the Hearing not as the Recording Secretary but as a private citizen your personal viewpoint would have been more appropriate.

PLAINTIFF'S EXHIBIT NO. 2

In the future I would caution you, while acting as the Recording Secretary, not to speak for the Comptroller's Office unless questioned directly.

I am sorry this situation arose and hope to avoid a similar situation in the future.

May 24, 1982

Ms. Barbara Conner
Comptroller's Office
City of Green Bay

Dear Barbara:

This is to inform you that your employment with the City of Green Bay as a probationary Clerk Steno II is terminated, effective 4:30 p.m. on May 24, 1982.

I would like to thank you for the services you provided to this department and wish you the best in future career endeavors.

Sincerely,

/s/ Rudy G. Reinhard

Rudy G. Reinhard
Finance Director/Comptroller

PLAINTIFF'S EXHIBIT NO. 3

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

BARBARA CONNOR,

Plaintiff,

v.

Case No.
83-C-0414

CITY OF GREEN BAY,

Defendant.

C O M P L A I N T

The Plaintiff, Barbara Connor, by her attorneys Lawton & Cates and Richard V. Graylow, for a cause of action against the above-named defendant alleges and shows to the court as follows:

PARTIES

1. Plaintiff, Barbara Connor, is an adult citizen of the United States residing at 215 N. Van Buren, Green Bay, Wisconsin.

2. Defendant is the the City of Green Bay located in the State of Wisconsin.

JURISDICTION

3. This court has original jurisdiction of this cause of action pursuant to 28 U.S.C. s. 1331., in that the matter in controversy exceeds the sum or value of ten thousand dollars ($10,000), exclusive of interest and costs, and arises under the Constitution of the United States. The instant action is brought under the provisions of 42 USCA §1983 for damages and reinstatement based upon violations of First Amendment rights and guarantees.

CLAIM FOR RELIEF

4. The plaintiff, Barbara Conner was hired by the defendant as a probationary Clerk Steno II on February 9, 1982. On May 12, 1982, the plaintiff

attended a meeting of the Board of Ethics to take the minutes of the meeting. The regular rules of order were suspended to allow all persons to speak on the issues in front of the Board. A true and correct copy of the Board of Ethics Minutes of Wednesday, May 12, 1982, is attached hereto, made a part hereof and incorporated by reference as Plaintiff's Exhibit No. 1

5. Pursuant to this rule suspension, the plaintiff took the opportunity to express her opinion about the use of the Contingency Fund. She was at all times speaking and expressly stated that she was speaking as a citizen of Green Bay.

6. On May 19, 1982, plaintiff received a formal letter of reprimand for expressing her opinion at the meeting. A true and correct copy of

said letter of reprimand is attached hereto, made a part hereof and incorporated by reference as Plaintiff's Exhibit No. 2.

7. Said letter of suspension was followed by letter of termination dated on or about May 24, 1982. A true and correct copy of same is attached hereto, made a part hereof and incorporated by reference as Plaintiff's Exhibit No. 3.

8. The plaintiff's comment at the meeting was the sole and determinative factor in the defendant's decision to terminate her.

9. The reprimand and termination of the plaintiff, by the defendant, were unlawful, improper and in violation of her First Amendment right to freedom of speech under the Constitution of the United States.

10. Demand is herewith made for Trial by Jury.

WHEREFORE, the plaintiff, Barbara Conner, demands judgement against the defendant, the City of Green Bay, for back pay, restoration of employment, and restoration of all fringe benefits together with compensatory and punitive damages in the amount of one million dollars ($1,000,000.00).

Dated in Madison, Wisconsin this 11th day of March, 1983.

/s/ Richard V. Graylow
LAWTON & CATES
By: Richard V. Graylow
110 East Main Street
Madison, WI 53703

Attorneys for Barbara Conner

BOARD OF ETHICS

Wednesday, May 12, 1982
9:00 PM - Room 604
City Hall, Green Bay

MEMBERS PRESENT: Chairman P. Dale Ives, Ernest Bellin, Thomas Camilli, Deana Naug and Ronald Venci.

OTHERS PRESENT: City Attorney James Simmonds; Assistant City Attorney Tim Kelley; Alderman Guy Zima; his attorney Joseph M. Recka; City Investigator Frank Guarascio; Aldermen Edward Bodart, James Demeny, Gordon Kropp, Joseph Marinan, Richard Zolper; members of the news media; and several citizens.

Chairman Ives called the reconvened meeting to order in open session. He stated that the Board has received a complaint from Aldermen Marinan and Zolper, and he called on City Attorney Simmonds for explication.

PLAINTIFF'S EXHIBIT NO. 1

Simmonds stated that the Board has received a second complaint regarding the defendant Guy Zima. Attached to the complaint is an unsigned unsworn document of several pages that make allegations. This document cannot be received or utilized for anything. Three choices exist: (1) Place it on file, (2) Instruct someone to order the complainant to appear for examination, or (3) Send someone to find him on an oil rig in Louisiana. If (3), then you have to request a budget from Common Council to send people down to take testimony. If (2), you have someone sign a subpoena with a blank date in it and if he's found within the limits of the State of Wisconsin, we can serve him with a subpoena and have him swear to the statements. If (1), file it and forget about it. The statement has to

be sworn to and attached to the complaint before any action can be taken.

Consideration was given to approaching the City Council for a budget for a proper investigation. It's one way to get some direction, to see how much they're willing to spend. Consideration was given to receiving and placing the complaint on file until the information upon which the complaint is based can be substantiated with a sworn statement. In that case we issue a blank subpoena, have the allegations sworn to, and organize an Ethics Board meeting organized as soon thereafter as possible.

Request was made for a redraft of the complaint to include the Federal and State laws that have been violated by which specific acts, once the

allegations have been sworn to. Then if a hearing is required, we serve the complaint.

It was moved and seconded to suspend the regular rules of order so as to hear the complainants. Motion passed unanimously.

Aldermen Marinan and Zolper were called to the meeting table. Question was asked whether they could substantiate their information. Reply was affirmative. Marinan asked whether this Board would be willing to provide his witness with police protection, and whether it was willing to go to the City Council requesting a budget to conduct an investigation; if not, no action could be taken. Marinan stated that if the City Council refuses a budget for the investigation he would be willing to pay for it out of his own pocket.

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Sincerely,

/s/ Rudy G. Reinhard

Rudy G. Reinhard
Finance Director/Comptroller

PLAINTIFF'S EXHIBIT NO. 3

Dated at Green Bay, Wisconsin, this 15th day of August, 1988.

Respectfully submitted,

Mark A. Warpinski
Attorney for Petitioners

James M. Kalny
Attorney for Petitioners

POST OFFICE ADDRESS:
Room 300, City Hall
100 N. Jefferson Street
Green Bay, WI 54301
(414) 436-3738

Supreme Court, U.S.
FILED
SEP 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 88-292

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RUDY G. REINHARD, *et al.*,
Petitioners,

vs.

BARBARA CONNER,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD V. GRAYLOW, Counsel of Record, and VICTOR M. ARELLANO, Attorneys for Respondent.

LAWTON & CATES, S.C.
214 West Mifflin Street
Madison, Wisconsin 53703-2594
(608) 256-9031

QUESTIONS PRESENTED

The Questions for Review as stated by Petitioners (Petition at 1-2) mischaracterize the legal issues at bar. The Respondent recasts them as follows:

1. In ruling upon a motion for summary judgment in which qualified immunity is claimed, must the reviewing court consider the entire record and view it in the light most favorable to the non-movant?
Answer below: Yes.

2. In May of 1982, was the constitutional right of a public employee to speak on a matter of public concern, as a private citizen but during working hours, in a manner in which the functioning of the employer was not impaired, clearly established?
Answer below: Yes.

3. In a case in which the subjective intent of the defendant is an essential element of the constitutional violation claimed (such as in a retaliatory discharge), and in which there is a genuine issue of material fact as to that intent, is the defendant entitled to qualified immunity?
Answer below: No (issue reached only by concurrence).

4. Under the federal common law, is a public official sued in his or her personal capacity in privity with his or her employer for purposes of res judicata (claim preclusion)?
Answer below: No.

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OPINION BELOW

The decision of the Seventh Circuit Court of Appeals for which Petitioners seek a Writ of Certiorari from this Court is reported as *Conner v. Reinhard*, 847 F.2d 384 (7th Cir. 1988). That

opinion was written by the Honorable Harlington Wood, Jr., Circuit Judge. The Honorable Richard D. Cudahy, Circuit Judge, wrote a brief concurring opinion.

In this Brief, for the convenience of the Court, citations to *Conner* will contain pinpoint citations to both the published and slip opinions. The slip opinion is the first item in the Appendix of Petitioners.

STATEMENT OF THE CASE

The facts of the case underlying the petition for certiorari are adequately and concisely set forth in the opinion of the Court of Appeals for the Seventh Circuit. *See Conner*, 847 F.2d at 386-87 (slip op. at 2-5).

The Statement of the Case by petitioners (Petition at 9-16) contains the following errors: First, it leaves out (as did the trial court) the portion of the meeting transcript that makes it clear that Conner tried to speak solely as a citizen but was forced to identify her employer.

Camilli: Is there anybody else that would like to speak?

Conner: I'd like to speak a little bit about the Contingency Fund not being for this purpose.

Marinan: What are you linked to?

Conner: I'm a citizen of Green Bay.

Marinan: You have no right to speak now.

Venci: Why? We suspended the (regular) order to let everybody speak.

Zolper: Well, if you're going to speak then we want your name and address and your position . . . what you do for a living.

Marinan: And we want to cross examine you . . . tell how you know that fact.

Venci: That's really intimidation, you guys.

Zolper: It's not.

Id. at 386 (slip op. at 2-3); *Compare id. with* Petition at 10; *Conner v. Reinhard*, No. 85-C-719, slip op. at 2 (E.D. Wis. Mar 26, 1987) (order granting summary judgment) (Appendix of Petitioners at 30, 32).

Second, the Petitioner leaves out important testimony in the record that constitutes direct evidence of retaliatory animus on the part of the Defendants.

> At the earlier trial against the City of Green Bay, [Sheila Cody] O'Connor testified to a conversation she had had with defendant Reinhard a few days after the Board of Ethics meeting. O'Connor stated that Reinhard told her Zolper had visited him that morning and was upset with Conner's behavior at the May 12th meeting. Reinhard said that Zolper wanted Conner fired, and if she was not fired, Zolper would have her position eliminated at budget time.

Conner, 847 F.2d at 396 (slip op. at 23).

Finally, Respondent Conner avers that unconstitutional retaliatory animus was at least a determining factor in her discharge, and consequently disassociates herself from the scenario found in the Petition at 13, in which Petitioners allege that such animus played no part in the decision.

ARGUMENT AGAINST ALLOWANCE

None of the Questions Presented by this case is appropriate for this Court's discretionary review, for the following reasons:

A. IN RULING UPON A MOTION FOR SUMMARY JUDGMENT IN WHICH QUALIFIED IMMUNITY IS CLAIMED, THE REVIEWING COURT MUST CONSIDER THE ENTIRE RECORD AND VIEW IT IN THE LIGHT MOST FAVORABLE TO THE NON-MOVANT.

At least eight Circuits have held that, in reviewing a summary judgment motion on qualified immunity grounds, the entire record must be reviewed and all factual disputes must be resolved in favor of the non-movant. *See Turner v. Dammon*, 848 F.2d 440, 444 (4th Cir. 1988); *DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 719 & n.2 (10th Cir. 1988); *Martin v. Malhoyt*, 830 F.2d 237, 253-54, *reh'g denied*, 833 F.2d 1049 (D.C. Cir. 1987); *Green v. Carlson*, 826 F.2d 647, 652 (7th Cir. 1987); *Robinson v. Viā*, 821 F.2d 913, 921-22 (2d Cir. 1987); *Trapnell v. Ralston*, 819 F.2d 182, 184

n.1 (8th Cir. 1987); *Myers v. Morris*, 810 F.2d 1437, 1459 (8th Cir. 1987); *Fernandez v. Leonard*, 784 F.2d 1209, 1213-14 (1st Cir. 1986); *Jasinski v. Adams*, 781 F.2d 843, 846 (per curiam), *reh'g denied*, 788 F.2d 694 (11th Cir. 1986); *Fludd v. United States Secret Serv.*, 771 F.2d 549, 554 (D.C. Cir. 1985); *Floyd v. Farrell*, 765 F.2d 1, 5-6 (1st Cir. 1985). Two other circuits have followed or suggested that procedure without explicit discussion of its correctness. *See Estate of Conners v. O'Connor*, 846 F.2d 1205 (9th Cir. 1988); *Kennedy v. City of Cleveland*, 797 F.2d 297, 299 (6th Cir. 1986); *Kraus v. County of Pierce*, 793 F.2d 1105, 1106-07, 1110 (9th Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S. Ct. 1571, 94 L. Ed. 2d 763 (1987); *see also Daniel v. Taylor*, 808 F.2d 1401, 1402 (11th Cir. 1986); *De Abadia v. Izquierdo Mora*, 792 F.2d 1187 (1st Cir. 1986); *Zook v. Brown*, 748 F.2d 1161, 1166-67 (7th Cir. 1984).

The First Circuit, overruling its prior cases *sub silentio*, now examines only the complaint in resolving such a motion. *Compare Bonitz v. Fair*, 804 F.2d 164, 168 (1st Cir. 1986) *with Bonitz* at 182 (Campbell, C.J., dissenting). This approach, which eviscerates the qualified immunity defense, has been repeatedly rejected by the other Circuits. *Turner*, 848 F.2d at 443-44; *see also DeVargas*, 844 F.2d at 719; *Green*, 826 F.2d at 650-52. The First Circuit has since backed off somewhat from its pure reliance on the complaint in cases in which the plaintiff's allegations were conclusory by examining undisputed facts in the record. *See, e.g., Nunez v. Izquierdo-Mora*, 834 F.2d 19, 21-22 (1st Cir.

1987); *Juarbe-Angueira v. Arias*, 831 F.2d 11, 14 (1st Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S. Ct. 1222, 99 L. Ed. 2d 423 (1988); *Vazquez Rios v. Hernandez Colon*, 819 F.2d 319, 321 (1st Cir. 1987); *Mendez-Palou v. Rohena-Betancourt*, 813 F.2d 1255, 1259-60 (1st Cir. 1987).

In the present case, the Seventh Circuit properly examined the entire record in the light most favorable to plaintiff Conner. This Court has previously indicated that this is the proper procedure:

> Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.

Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411, 425 (1985). In the present case, the evidence gleaned from discovery established genuine issues of fact that precluded summary judgement. The procedure utilized by the Seventh Circuit is in accord with the weight of authority and accords with standard summary judgment procedures. Although there is a conflict between the Circuits on this point, the recalcitrant First Circuit is moving slowly toward the position of the other Circuits. The issue is not ripe for Supreme Court discretionary review because there is no substantial conflict among the Circuits.

B. IN MAY OF 1982, THE CONSTITUTIONAL RIGHT OF A PUBLIC EMPLOYEE TO SPEAK ON A MATTER OF PUBLIC CONCERN, AS A PRIVATE CITIZEN BUT DURING WORKING HOURS, IN A MANNER IN WHICH THE FUNCTIONING OF THE EMPLOYER WAS NOT IMPAIRED, WAS CLEARLY ESTABLISHED.

When a public employee speaks on an issue of public concern in a manner embarrassing to her employer, the employee's interest in being able to speak freely must be balanced against the employer's interest in efficient public service. *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734-35, 20 L. Ed. 2d 811, 817 (1968). It has been clear since 1979 that on-the-job expressions by public employees are entitled to constitutional protection if they are speaking as private individuals. *See Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410, 413-14, 99 S. Ct. 693, 695-96, 58 L. Ed. 2d 619, 623 (1979).

The Seventh Circuit has refined and elaborated upon the *Pickering* holding by enumerating factors to consider in performing the balancing of interests it mandates. *See Clark v. Holmes*, 474 F.2d 928, 931 (7th Cir. 1972), *cert. denied*, 411 U.S. 972, 93 S. Ct. 2148, 36 L. Ed. 2d 695 (1973). The factors include the ramification of the employee's speech on discipline and employee harmony, needs for confidentiality, interference with the speaker's daily duties, and any need for a close employee-superior relationship. *Id.* The Seventh Circuit, below, examined these factors and their further

refinement by case law prior to 1982 and concluded Conner's discharge, viewed in the light most favorable to her, could not as a matter of law be categorized as done in good faith. *Conner*, 847 F.2d at 389-93 (slip op. at 8-17). The court's holding was correct, well reasoned, and fair.

C. IN A CASE IN WHICH THE SUBJECTIVE INTENT OF THE DEFENDANT IS AN ESSENTIAL ELEMENT OF THE CONSTITUTIONAL VIOLATION CLAIMED, AND IN WHICH THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO THAT INTENT, THE DEFENDANT IS NOT ENTITLED TO QUALIFIED IMMUNITY.

This case presents an additional balancing problem, that of allowing civil rights plaintiffs to vindicate their rights when they must prove wrongful intent versus preventing vexatious litigation against public officials. *See Conner*, 847 F.2d at 398 (Cudahy, J., concurring) (slip op. at 26); *Harlow v. Fitzgerald*, 457 U.S. 800, 819, 102 S. Ct. 2727, 2739, 73 L. Ed. 2d 396, 411 (1982). This issue was not reached by the majority in this case. The opinion of Circuit Judge Cudahy on the point is well taken and, in Conner's view, could appropriately have been inserted into the majority opinion.

Judge Cudahy held that Conner's specific allegations of impermissible motive, supported by substantial evidence, precluded summary judgment on qualified immunity grounds, following the well-reasoned interpretations of

Harlow by the Ninth, and District of Columbia Circuits. *Conner*, 847 F.2d at 398-99 (Cudahy, J., concurring) (citing *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1049-51 (9th Cir. 1988); *Martin v. District of Columbia Metro. Police Dep't*, 812 F.2d 1425, 1431-33, *modified*, 817 F.2d 144, *modification vacated sub nom. Bartlett ex rel. Neuman v. Bowen*, 824 F.2d 1240 (D.C. Cir. 1987)) (slip op. at 26-27). The difficulty perceived by Petitioners is that *Harlow* spoke of eliminating the "subjective" aspect of the "good faith" immunity defense. *Harlow*, 457 U.S. at 815, 102 S. Ct. at 2736-37, 73 L. Ed. 2d at 408-09. The Second Circuit Court of Appeals has most succinctly solved the Petitioners' problem:

> The *Harlow* test is objective, but in the sense that a court is precluded from determining whether a public official was actually aware of the legal standards in question; instead, the official is charged with such knowledge if the appropriate legal standard is, by objective standards, clearly established at the time the official undertook the activity at issue. . . . *Harlow* precludes inquiry into the defendant's state of mind only with respect to the state of the law. . . . *Harlow* does not require us . . . to ignore the fact that intent is an element of the relevant cause of action [in this case].

Musso v. Hourigan, 836 F.2d 736, 743 (2d Cir. 1988).

If the law was clearly established at the relevant time, a qualified immunity defense must be rejected if a genuine issue of material fact exists that impermissible motives led to the

action complained of. *Conner*, 847 F.2d at 398-99 (Cudahy, J., concurring) (slip op. at 27-28); *Pueblo Neighborhood Health Centers, Inc. v. Losario*, 847 F.2d 642, 649 (10th Cir. 1988); *Schwartzman v. Valenzuela*, 846 F.2d 1209, 1212 (9th Cir. 1988); *Gutierrez*, 838 F.2d at 1051 & n.29; *Musso*, 836 F.2d at 742-43; *Martin*, 812 F.2d at 1433 & n.18; *Wright v. South Ark. Regional Health Center, Inc.*, 800 F.2d 199, 202-03 (8th Cir. 1986); *Benson v. Allphin*, 786 F.2d 268, 276 n.19 (7th Cir.), *cert. denied*, ___ U.S. ___ 107 S. Ct. 172, 93 L. Ed. 2d 109 (1986); *Kenyatta v. Moore*, 744 F.2d 1179, 1185 (5th Cir. 1984), *cert. denied*, 471 U.S. 1066, 105 S. Ct. 2141, 85 L. Ed. 2d 498 (1985); *Espanola Way Corp. v. Meyerson*, 690 F.2d 827, 830 (11th Cir. 1982), *cert. denied*, 460 U.S. 1039, 103 S. Ct. 1431, 75 L. Ed. 2d 791 (1983); *but see Halperin v. Kissinger*, 807 F.2d 180, 186-87 (D.C. Cir. 1986) (not applying the rule in a national security context). Public officials are amply protected by the requirement that unsupported allegations of malice are to be ignored in determining what disputes of material fact exist. *See Pueblo Neighborhood*, 847 F.2d at 650; *Trapnell v. Ralston*, 819 F.2d 182, 185 (8th Cir. 1987); *Krohn v. United States*, 742 F.2d 24, 31 (1st Cir. 1984); *Hobson v. Wilson*, 737 F.2d 1, 29-30 (D.C. Cir. 1984); *Miller v. Solem*, 728 F.2d 1020, 1025-26 (8th Cir.), *cert. denied*, 469 U.S. 841, 105 S. Ct. 145, 83 L. Ed. 2d 84 (1984).

As yet there are no substantial conflicts in the Court of Appeals' interpretations of *Harlow*, all of them follow the spirit of that decision, and

thus the issue is not ripe for Supreme Court discretionary review. To Respondent's knowledge, it remains true that:

> No court . . . has extended *Harlow's* proscription of subjective inquiry beyond the issue of knowledge of the law and intent related to knowledge of the law, except in a national security context.

Halperin, 807 F.2d at 186 (Scalia, J., sitting as designated Circuit Justice).

D. UNDER FEDERAL COMMON LAW, A PUBLIC OFFICIAL SUED IN HIS OR HER PERSONAL CAPACITY IS NOT IN PRIVITY WITH HIS OR HER EMPLOYER FOR PURPOSES OF RES JUDICATA.

A public official sued in his or her official capacity is, quite naturally, considered in privity with his or her employer under federal claim preclusion law. *See, e.g., Lee v. City of Peoria*, 685 F.2d 196, 199 n.4 (7th Cir. 1982).

The two Circuits that have directly considered whether public officials sued in their personal capacities are in privity with their employer under federal common law have held that they are not. *See Conner, supra*, at 396 (slip op. at 22-23); *Headley v. Bacon*, 828 F.2d 1272, 1279 (8th Cir. 1987); *Beard v. O'Neal*, 728 F.2d 894, 897 (7th Cir.), *cert. denied*, 469 U.S. 825, 105 S. Ct. 104, 83 L. Ed. 2d 48 (1984); *see also* C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4458, at 508 (1981) ("[A] judgment against a

government does not bind its officials in subsequent litigation that asserts a personal liability against the officials."). Because such state officials are "stripped" of their official status for Eleventh Amendment purposes, stripping of privity for § 1983 purposes is quite natural. *See Ex Parte Young*, 209 U.S. 123, 159-60, 28 S. Ct. 441, 454, 52 L. Ed. 714, 729 (1908).

Three federal courts have held, under state law, that a prior suit in state court against a government does not preclude a later federal action against employees of that government in their personal capacities. *See Morgan v. City of Rollins*, 792 F.2d 975, 980 (10th Cir. 1986) (law of Wyoming); *Meding v. Hurd*, 607 F. Supp. 1088, 1101 (D. Del. 1985) (law of Delaware); *Roy v. City of Augusta, Me.*, 712 F.2d 1517, 1521-22 (1st Cir. 1983) (law of Maine). These cases follow the rule stated by the Restatement (Second) of Judgments § 36(2) and comment e (1982).

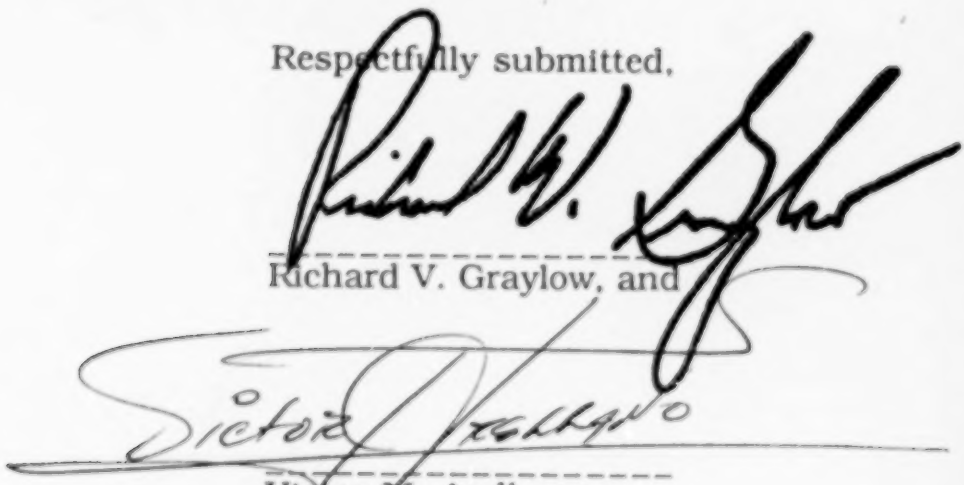
The approach of the court below is eminently reasonable, no conflict among the Circuits exists, the issue arises so infrequently that it is not of national significance, and therefore the Question Presented is not appropriate for review by this Court.

CONCLUSION

For the reasons set forth above, the Respondent herein submits that a writ of certiorari should not be granted in this case.

Dated, signed and mailed in Madison, Wisconsin, this 31st day of August, 1988.

Respectfully submitted,



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CASE NO. 88-292

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

RUDY G. REINHARD AND THE ESTATE OF RICHARD J. ZOLPER, DECEASED, THROUGH AND BY IRENE M. ZOLPER, THE PERSONAL REPRESENTATIVE OF THE ESTATE OF RICHARD J. ZOLPER,

PETITIONERS,

V.

BARBARA CONNER,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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A. MANY CIRCUITS ARE APPLYING THE QUALIFIED IMMUNITY DEFENSE IN A WAY THAT IS CONTRARY TO THE SPIRIT AND EXPRESS HOLDING OF **HARLOW V. FITZGERALD**.

In Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the court held:

> "It is not difficult for an ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decision-maker's mental process are involved. A sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually, under normal summary judgment standards, be sufficient [to force a trial]..." p. 2738, S.Ct.

As previously argued, this quote compels two conclusions:

> 1. The standards under which a qualified immunity defense is to be measured is different from normal summary judgment standards.
>
> 2. Where a case presented under a qualified immunity defense presents a situation involving subtle questions of constitutional law and a decisionmaker's mental process, the court should not

permit a plaintiff to "create" a material issue of fact.

Respondent states in its brief in opposition to certiorari that most circuits have held, in reviewing qualified immunity motions, that all factual disputes must be resolved in favor of the non-movant. These circuits have expressly held that "normal" summary judgment rules apply to qualified immunity cases. This does not square with the holding of Harlow, supra, as quoted above. These circuits are erroding the well considered underpinnings of Harlow, supra, and the other qualified immunity cases.

By reviewing the Seventh Circuit's holding herein, this Court can clarify and expressly state the precise standard to be used in qualified immunity cases.

B. THIS COURT SHOULD ADDRESS THE APPLICATION OF QUALIFIED IMMUNITY TO A **MT. HEALTHY V. DOYLE** TYPE CASE.

Government officials are immune from suit if their actions do not violate any clearly established constitutional rights. Harlow, supra The rule of retaliatory discharge consists of two elements: was the employee's action constitutionally protected and was the constitutionally protected activity a substantial or motivating factor in the employee's discharge. Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977)

Thus, the cause of action is established by allegations of the exercise of a constitutional right by a public employee, subsequent discipline by the employer, and a claim that the discipline was substantially motivated

by the exercise of the constitutional right.

The Seventh Circuit's current application of qualified immunity in a Mt. Healthy context considers only the issue of whether the "conduct" is clearly protected. Once the protected nature of the conduct is established, an employee need only allege that constitutionally-protected conduct caused the discipline. The employer's denial of that allegation creates a material issue of fact as to whether the protected conduct resulted in the discipline and, therefore, compels a trial. The result of this rule is if the employee can allege protected conduct and subsequent discipline, the qualified immunity defense is nulified.

This Court has never discussed qualified immunity in a Mt. Healthy type

case. In a Mt. Healthy context, the question should not be considered in a light most favorable to the plaintiff because the purpose of qualified immunity is emasculated. Petitioners contend that the court should consider if, under a standard of reasonableness, whether the public-sector employer's discipline was motivated by the protected conduct.

C. THIS CASE PRESENTS A QUESTION OF LAW NOT SETTLED IN THE UNITED STATES.

At page 7 in the respondent's brief in opposition, the respondent argues that the constitutional rights involved in this case were clearly established at the time of the discharge. The cited cases are clear enough but not applicable.

After the plaintiff's speech at the Board of Ethics meeting, her supervisor in writing requested that she not speak

in a manner viewed as on behalf of his department. Subsequently, the respondent orally stated to her employer that she would do the same thing again. Only then was the respondent discharged for insubordination.

Aware that it is not appropriate to argue the merits at this point, petitioners assert that there is no law concerning factual situations reasonably analogous to this. The real issues in this case are:

> 1. Can a public-sector supervisor instruct a public-sector employee not to speak in a manner viewed as on behalf of the public-sector supervisor's office?
>
> 2. If such instruction is permitted, may the public-sector employer discipline for a refusal to follow that instruction?

These issues have not been addressed and are of significant precedential value on a nation wide basis on an employer's authority over subordinates.

The court should address this unique issue and clarify what constitutes a "clearly established" right in the context of qualified immunity.

D. THIS COURT SHOULD DETERMINE THE STANDARD TO BE USED IF A PUBLIC OFFICIAL IS IN PRIVITY WITH HIS OR HER EMPLOYER FOR THE PURPOSES OF RES JUDICATA.

Only two circuits have considered whether public officials sued in personal capacity are in privity with their employer under federal common law. However, respondent misleads this court by implying that Headley v. Bacon, 828 F.2d 1272 (8th Cir. 1987), stands for the proposition that this lack of privity exists in all cases. Headley, supra, lists several factors to be considered by the court in making that determination.

Only the instant case implies that as a matter of federal common law public-sector officials are never in

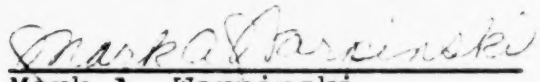
privity with their employer. Any case that can be read in such a manner is a dangerous precedent. Petitioners submit that privity should be determined on a case-by-case basis by considering if the actions complained of took place in the course of normal employment and in official capacity. This rule encourages responsible public-sector employee activity and encourages public-sector employment.

The Seventh Circuit's holding below creates insurance headaches for public-sector employers who want to responsibly protect their officials, discourages public-sector employment by making all public-sector officials liable for suit both on official and personal grounds, and further confuses the already complicated mandatory employee subrogation provisions of many

states. The federal common law should be clarified by this Court in this case.

Dated at Green Bay, Wisconsin, this 19th day of September, 1988.

Respectfully submitted,



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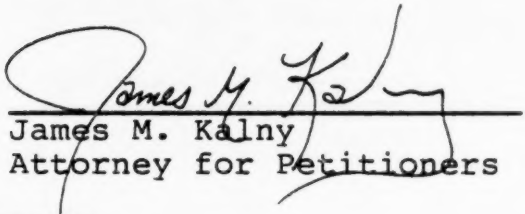

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